Google

This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

Br 169.07.5

Harvard College Library

FROM THE
J. HUNTINGTON WOLCOTT
FUND

GIVEN BY ROGER WOLCOTT [CLASS OF 1870] IN MEMORY OF HIS FATHER FOR THE "PURCHASE OF BOOKS OF PERMANENT VALUE, THE PREFERENCE TO BE GIVEN TO WORKS OF HISTORY, POLITICAL ECONOMY AND SOCIOLOGY"

SELECT ESSAYS IN
ANGLO-AMERICAN LEGAL HISTORY

VOLUME THREE

SELECT ESSAYS

IN

ANGLO-AMERICAN LEGAL HISTORY

By VARIOUS AUTHORS

COMPILED AND EDITED BY A COMMITTEE OF THE

ASSOCIATION OF AMERICAN LAW SCHOOLS

IN THREE VOLUMES

VOLUME III

BOSTON
LITTLE, BROWN, AND COMPANY
1909

~~XE, 11584~~

Br 169.07.5

HARVARD COLLEGE LIBRARY
SEP 27 1909

Wolcott fund
(III)

Copyright, 1909,
BY LITTLE, BROWN, AND COMPANY.

All rights reserved

Published, September, 1909

Electrotyped and Printed by
THE COLONIAL PRESS
C. H. Simonds & Co., Boston, U.S.A.

PREFACE

WITH the present Volume ends this collection of essays, and the editors finish their task.

> How shall we prologuise, how shall we perorate,
> Say fit things upon art and history?

Suffice it, in taking leave, to express the hope that these volumes have in perusal been as interesting to their readers as they were in preparation to their editors. Carlyle, discoursing on History, reminds us that "whereas of old the charm of History lay chiefly in gratifying our common appetite for the wonderful, for the unknown, and her office was but as that of Minstrel and Story-teller, she has now farther become a Schoolmistress, and professes to instruct in gratifying." That these essays may gratify while instructing is the wish of the editors.

It is to them a special satisfaction, in this third Volume, to have succeeded in the endeavor (announced in the preface to the second Volume) to include an essay worthily representative of French scholarship in the field of English law — that of Professor Robert Caillemer, of the University of Grenoble.

In this Volume, the topics are all of concrete and vivid interest. Several of them trace principles still in process of growth. Research has in some important respects revealed different results to different scholars working on the same materials. Hence occasionally the added interest, for the student, of reconciling the conflicting beliefs, or of choosing between them. For those who must decline either alternative,

there remains the consolation proffered six centuries ago by the seer of Italy, "To doubt is not less grateful than to know."

The editors, in thus assembling these seventy-six essays, may be granted leave (without desiring to magnify their office) humbly to take pleasure in the thought that at least and at last something has been finished which needed to be done, while the profession is awaiting the accomplishment of greater and more difficult tasks in the vast region of Anglo-American legal history. THE EDITORS.

July 1, 1909.

A TABLE OF BRITISH REGNAL YEARS

Sovereigns	Commencement of Reign
William I.	October 14, 1066
William II.	September 26, 1087
Henry I.	August 5, 1100
Stephen	December 26, 1135
Henry II.	December 19, 1154
Richard I.	September 23, 1189
John	May 27, 1199
Henry III.	October 28, 1216
Edward I.	November 20, 1272
Edward II.	July 8, 1307
Edward III.	January 25, 1326
Richard II.	June 22, 1377
Henry IV.	September 30, 1399
Henry V.	March 21, 1413
Henry VI.	September 1, 1422
Edward IV.	March 4, 1461
Edward V.	April 9, 1483
Richard III.	June 26, 1483
Henry VII.	August 22, 1485
Henry VIII.	April 22, 1509
Edward VI.	January 28, 1546
Mary	July 6, 1553
Elizabeth	November 17, 1558
James I.	March 24, 1603
Charles I.	March 27, 1625
The Commonwealth	January 30, 1649
Charles II.[1]	May 29, 1660
James II.	February 6, 1685
William and Mary	February 13, 1689
Anne	March 8, 1702
George I.	August 1, 1714
George II.	June 11, 1727
George III.	October 25, 1760
George IV.	January 29, 1820
William IV.	June 26, 1830
Victoria	June 20, 1837
Edward VII.	January 22, 1901

[1] Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 30, 1649, so that the year of his restoration is styled the twelfth year of his reign.

SELECT ESSAYS IN
ANGLO-AMERICAN LEGAL HISTORY

VOLUME III

HISTORY OF PARTICULAR TOPICS, CONTINUED

JAMES BARR AMES

CONTENTS

BOOK II: HISTORY OF PARTICULAR TOPICS

(Continued)

PART V. COMMERCIAL LAW

47. General Survey of the History of the Law Merchant . . THOMAS EDWARD SCRUTTON 7
48. The Merchants of the Staple 16
SPENCER BRODHURST
49. Contributions of the Law Merchant to the Common Law . FRANCIS MARION BURDICK 34
50. The Early History of Negotiable Instruments . 51
EDWARD JENKS
51. Promissory Notes Before and After Lord Holt . 72
WILLIAM CRANCH
52. The Early History of Insurance Law . . . 98
WILLIAM REYNOLDS VANCE
53. The Early History of the English Patent System 117
EDWARD WYNDHAM HULME
54. The History of the Carrier's Liability . . 148
JOSEPH HENRY BEALE, JR.
55. Early Forms of Corporateness 161
CECIL THOMAS CARR
56. Early Forms of Partnership 183
WILLIAM MITCHELL
57. The History of the Law of Business Corporations before 1800 . . SAMUEL WILLISTON 195
58. History of the Law of Private Corporations in the Colonies and States SIMEON EBEN BALDWIN 236

PART VI. CONTRACTS

59. The History of Assumpsit 259
JAMES BARR AMES
60. The History of Parol Contracts prior to Assumpsit 304
JAMES BARR AMES
61. The History of Contract 320
JOHN WILLIAM SALMOND
62. History of the Beneficiary's Action in Assumpsit 339
CRAWFORD DAWES HENING
63. The History of Agency 368
OLIVER WENDELL HOLMES, JR.

PART VII. TORTS

64. The History of Trover 417
JAMES BARR AMES
65. The History of the Law of Defamation . . 446
VAN VECHTEN VEEDER
66. Responsibility for Tortious Acts: Its History . 474
JOHN HENRY WIGMORE

PART VIII. PROPERTY (IN GENERAL)

67. The Disseisin of Chattels 541
JAMES BARR AMES
68. The Mystery of Seisin 591
FREDERIC WILLIAM MAITLAND
69. The History of the Action of Ejectment in England and the United States 611
ARTHUR GEORGE SEDGWICK and
FREDERICK SCOTT WAIT
70. The Gage of Land in Mediæval England . . 646
HAROLD DEXTER HAZELTINE
71. Changes in the English Law of Real Property During the Nineteenth Century 673
ARTHUR UNDERHILL

PART IX. WILLS, DESCENT, MARRIAGE

72. The Mediæval Law of Intestacy . . . 723
CHARLES GROSS
73. Executors in Earlier English Law . . . 737
OLIVER WENDELL HOLMES, JR.
74. The Executor in England and on the Continent . 746
ROBERT CAILLEMER
75. The Rise of the English Will 770
MELVILLE MADISON BIGELOW
76. Marriage and Divorce Under Roman and English Law . . . . . JAMES BRYCE 782

PART V.

COMMERCIAL LAW

47. General Survey of the History of the Law Merchant.

THOMAS EDWARD SCRUTTON.

48. The Merchants of the Staple.

SPENCER BRODHURST.

49. Contributions of the Law Merchant to the Common Law.

FRANCIS MARION BURDICK.

50. Early History of Negotiable Instruments.

EDWARD JENKS.

51. Promissory Notes before and after Lord Holt.

WILLIAM CRANCH.

52. Early History of Insurance Law.

WILLIAM REYNOLDS VANCE.

53. History of the System of Patents for Industrial Invention.

EDWARD WYNDHAM HULME.

54. History of the Carrier's Liability.

JOSEPH HENRY BEALE, JR.

55. Early Aspects of Corporateness.

CECIL THOMAS CARR.

56. Early Forms of Partnership.

WILLIAM MITCHELL.

57. History of the Law of Business Corporations before 1800.

SAMUEL WILLISTON.

58. History of the Law of Private Corporations in the Colonies and States.

SIMEON EBEN BALDWIN.

OTHER REFERENCES ON THE SUBJECTS OF THIS PART ARE AS FOLLOWS:

In Select Essays:

Roman Law Influence in the Law Merchant, by T. E. Scrutton (No. 7, Vol. I).

The Development of the Law Merchant, by W. S. Holdsworth (No. 9, Vol. I).

The History of Admiralty Jurisdiction, by T. L. Mears (No. 30, Vol. II).

In Other Series and Journals:

The Early History of the Law Merchant, by A. T. Carter (Law Quarterly Review, XVII, 232; 1901).

The History of Marine Insurance, by F. Martin (1876).

The History of the Liability of Ship-Owners at Common Law, by E. L. de Hart (Law Quarterly Review, V, 15; 1889).

The History of the Water-Carrier and his Responsibility, by J. B. C. Stephen (Law Quarterly Review, XII, 116; 1896).

Trust and Corporation, by F. W. Maitland (Zeitschrift fuer das Privat — und Oeffentliches Recht der Gegenwart, ed. Gruenhut, Vienna, XXIII, 1; 1904).

The Corporation Sole, by F. W. Maitland (Law Quarterly Review, XVI, 335; 1900).

History of Admiralty Jurisdiction in the United States Supreme Court, Anon. (American Law Review, V, 581; 1871).

History of Joint Stock Companies, by T. B. Napier (Ch. XII in "A Century of Law Reform," 1901).

The Genesis of a Corporation, by R. L. Raymond (Harvard Law Review, XIX, 350; 1906).

History of the Common-Law Conception of a Corporation, by E. B. Seymour (American Law Register, New Series, XLII, 529; 1902).

Carriers and the Common Law, by O. W. Holmes (American Law Review, XIII, 609; 1879).

The Court of Piepowder, by C. Gross (Quarterly Journal of Economics, XX, 231; 1906).

Legislative History of Corporations in New York, by A. B. Johnson (Hunt's Merchants' Magazine, XX, 610; 1850).

Borough Customs, Introduction by Mary Bateson (Selden Society Publications, vols. XVIII, XXI, 1904-6).

Beverly Town Documents, Introduction by A. F. Leach (Selden Society Publications, vol. XIV; 1900).

Select Pleas of the Jewish Exchequer, Introduction by J. M. Rigg (Selden Society Publications, vol. XV; 1901).

The Leet Jurisdiction of Norwich, Introduction by W. Hudson (Selden Society Publications, vol. V; 1891).

The Law Merchant, , Introduction by C. Gross (Selden Society Publications, vol. XXIII; 1908).

Leet Jurisdiction in England, by F. J. C. Hearnshaw (Southampton Record Society, 1908).

The Internal Organization of the Merchant Adventurers of England, by W. E. Lingelbach (Phila. 1903).

The Evolution of the English Joint-Stock Trading Company, by F. Evans (Columbia Law Review, VIII, 339, 461; 1908).

SELECT ESSAYS
IN
ANGLO-AMERICAN LEGAL HISTORY

47. GENERAL SURVEY OF THE HISTORY OF THE LAW MERCHANT[1]

By Thomas Edward Scrutton[2]

IF you read the law reports of the seventeenth century you will be struck with one very remarkable fact; either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters, each of which alternatives appears improbable. But it is a curious fact that one finds in the reports of that century, two hundred years ago, hardly any commercial cases. If one looks up the Law of Bills of Exchange, "the cases on the subject are comparatively few and unimportant till the time of Lord Mansfield."[3] If you turn to Policies of Insurance, and to the work of Mr. Justice Park on the subject published at the beginning of this century, you find him saying: "I am sure I rather go beyond bounds if I assert that in all our reports from the reign of Queen Elizabeth to the year 1756, when Lord Mansfield became Chief Justice of the King's Bench, there are sixty cases upon matters of insurance."[4] If you come to Charter Parties and Bills of Lading,

[1] This Essay appeared as pp. 4–16, Chap. I, of "The Elements of Mercantile Law," 1891 (London: Wm. Clowes & Sons), a course of lectures delivered before the Incorporated Law Society. The same passage was afterwards reprinted in the late Professor Huffcut's "Cases on Bills and Notes."

[2] A biographical notice of this author is prefixed to Essay No. 7, in Vol. I of these Essays.

[3] Chalmers, Bills, Pref. p. 36. [4] Park, I. Pref. 43.

which have always been productive of litigation, you find Sir John Davies in the seventeenth century saying that "until he understood the difference between the Law of Merchants and the Common Law of England, he did not a little marvel what should be the cause that in the books of the Common Law of England there should be found so few cases concerning merchants and ships, but now the reason was apparent, for that the Common Law did leave these cases to be ruled by another law, the Law Merchant, which is a branch of the Law of Nations." [1]

The reason why there were hardly any cases dealing with commercial matters in the Reports of the Common Law Courts is that such cases were dealt with by special Courts and under a special law. That law was an old-established law and largely based on mercantile customs. Gerard Malynes, who wrote the first work on the Merchant Law in England, called his book, published in 1622, "*Consuetudo vel Lex Mercatoria*," or the Ancient Law Merchant; and he said in his preface: "I have entituled the book according to the ancient name of *Lex Mercatoria*, and not *Jus Mercatorum*, because it is a customary law approved by the authority of all kingdoms and commonweales, and not a law established by the sovereignty of any prince." And Blackstone, in the middle of the last century, says: "The affairs of commerce are regulated by a law of their own called the Law Merchant or *Lex Mercatoria*, which all nations agree in and take notice of, and it is particularly held to be part of the law of England which decides the causes of merchants by the general rules which obtain in all commercial countries, and that often even in matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange." [2] Later than Blackstone, Lord Mansfield lays down that "Mercantile Law is not the law of a particular country, but the law of all nations"; [3] while so recently as 1883 you find Lord Blackburn saying in the House of Lords that "the general Law Merchant for many years

[1] Zouch, Jurisdiction of the Admiralty (1686), p. 89.
[2] Blackstone, Commentaries, I. 273; IV. 67.
[3] *Luke* v. *Lyde*, 2 Burr. at p. 887.

has in all countries caused Bills of Exchange to be negotiable; there are in some cases differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the Law Merchant are the same in all countries." [1]

Now if we follow the growth of this Law Merchant or Mercantile Law, which was two hundred years ago so distinct from the Common Law, we find it in England going through three stages of development.[2] The first stage may be fixed as ending at the appointment of Coke as Lord Chief Justice in the year 1606, and before that time you will find the Law Merchant as a special law administered by special Courts for a special class of people.

In the first place as to the special Courts. The greater part of the foreign trade of England, and indeed of the whole of Europe at that time, was conducted in the great fairs, held at fixed places and fixed times in each year, to which merchants of all countries came; fairs very similar to those which meet every year at the present time at Novgorod in Russia, and at other places in the East. In England, also, there were then the great fairs of Winchester and Stourbridge, and the fairs of Besançon and Lyons in France, and in each of those fairs a Court sat to administer speedy justice by the Law Merchant to the merchants who congregated in the fairs, and in case of doubt and difficulty to have that law declared on the basis of mercantile customs by the merchants who were present. You will find this Court mentioned in the old English law books as the Court *Pepoudrous*, so called because justice was administered "while the dust fell from the feet," so quick were the Courts supposed to be. "This Court is incident to every fair and market because that for contracts and injuries done concerning the fair or market there shall be as speedy justice done for advancement of trade and traffic as the dust can fall from the feet, the proceeding there being *de hora in horam*." [3] Indeed, so far back as Bracton in the thirteenth century, it had been recognized that

[1] *M'Lean* v. *Clydesdale Bank*, 9 App. C. at p. 105.
[2] Macdonell, Preface to Smith's Mercantile Law, p. 82.
[3] Coke, Inst. IV. 272.

there were certain classes of people "who ought to have swift justice, such as merchants, to whom justice is given in the Court Pepoudrous."[1] The records of these Courts are few, for obviously in Courts for rapid business law reporters were rather at a discount. As a consequence, "there is no part of the history of English law more obscure than that connected with the maxim that the Law Merchant is part of the law of the land."[2] We are, however, fortunate enough to have one or two records of the Courts of the Fairs. The Selden Society has succeeded in unearthing the Abbot's roll of the fair of St. Ives held in 1275 and 1291,[3] containing a series of cases which show how the merchants administered the Law Merchant in the Courts of the fair, and why such cases did not come into the King's Court. For instance:— "Thomas, of Wells, complains of Adam Garsop that he unjustly detains and deforces from him a coffer which the said Adam sold to him on Wednesday next after Mid Lent last past for sixpence, whereof he paid to the said Adam twopence and a drink in advance"— (it appears to have been a very good mercantile custom, still existing, to "wet a bargain," and the drink was a matter to which great importance was attached by the merchants present); "and on the Octave of Easter came and would have paid the rest, but the said Adam would not receive it nor answer for the said coffer, but detained it unconditionally to his damage and dishonour, *2s.*, and he produces suit. The said Adam is present and does not defend. Therefore let him make satisfaction to the said Thomas and be in mercy for the unjust detainer; fine *6d.*; pledge his overcoat." The next defendant was not so fortunate as to have an overcoat. "Reginald Picard of Stamford came and confessed by his own mouth that he sold to Peter Redhood of London a ring of brass for 5½*d.*, saying that the said ring was of the purest gold, and that he and a one-eyed man found it on the last Sunday in the churchyard of St. Ives, near the cross." (One fancies one has heard that tale about the brass ring before.) "Therefore it is considered

[1] Bracton, f. 334.
[2] Blackburn on Sale, 1st ed. p. 207.
[3] Selden Society, Vol. II. pp. 130 *et seq.*

that the said Reginald do make satisfaction to the said Peter for the 5½*d.* and be in mercy for the trespass; he is poor; pledge his body." The next case introduces the Law Merchant. "Nicolas Legge complains of Nicolas of Mildenhall for that unjustly he impedes him from having, *according to the usage of merchants*, part in a certain ox which Nicolas of Mildenhall bought in his presence in the village of St. Ives on Monday last past to his damage 2*s.*, whereas he was ready to pay half the price, which price was 2*s.* 6*d.* And Nicolas of Mildenhall defends, and says that the Law Merchant does well allow that every merchant may participate in a bargain in the butcher's trade if he claim a part thereof at the time of the sale; but to prove that the said Nicolas Legge was not present at the time of the purchase nor claimed a part thereof he is ready to make law." Then they went to the proof. The custom of the Law Merchant relied on admitted any merchant standing by to claim a share in any bargain on paying a share of the price. The defence is, "You were not there, so you cannot claim." The next and last case is one which puzzled the Court, and therefore I omit the details, but it is recited in the Abbot's roll: "And the case is respited till it shall be more thoroughly discussed by the merchants. And the merchants of the various commonalties and others being convoked in full Court it is considered" — and then they go on to discuss it. There you see the Merchants' Court at work, giving quick justice in all mercantile disputes, and in cases of doubt calling upon the merchants present to declare what the Law Merchant is. So much for the fairs.

In most seaport towns also you would find a similar Court dealing with cases arising out of ships. In the Domesday Book of Ipswich[1] it is stated, "The pleas between strange folk that men call 'pypoudrous' should be pleaded from day to day. The pleas in time of fair between stranger and passer should be pleaded from hour to hour, as well in the forenoon as in the afternoon, and that is to wit of plaints begun in the same time of fair, and the pleas given to the law

[1] Black Book of Admiralty, Rolls Series, II. 23.

marine for strange mariners passing, and for them that abide not but their tide, should be pleaded from tide to tide." Any ship coming into the port of Ipswich with a dispute about its Charter Party or Bill of Lading may get summary justice at once from this Court at Ipswich between tide and tide. Stress may be laid on the fact that the Courts sat in the afternoon, because at that time the King's Courts only sat from eight in the morning till eleven and then adjourned for the rest of the day. "For in the afternoons these Courts are not holden. But the suitors then resort to the perusing of their writings, and elsewhere consulting with the serjeants-at-law and other their counsellors,"[1] so that the time taken up in consultation by the Courts in London was taken up by the Courts at Ipswich in dealing summarily with cases, and letting the strange mariners go who were only waiting for their tide.

There were special Courts by statute, of which a number of "grave and discreet merchants" were necessary members, in order that the Mercantile Law founded on the custom of merchants might be duly applied to the case before them.[2] The law which these Courts administered was what was called by merchants the Law Merchant and Law of the Sea, and it was common to nearly every European country. Much of it was to be found in a series of codes of Sea Laws, such as the Laws of Oleron and Wisbury, and the Consolato del Mare, embodying the customs and practices of merchants of different countries, and it was not the Common Law of England. Further, it was only for a particular class. You had to show yourself to be a merchant before you got into the Mercantile Court; and until about two hundred years ago it was still necessary to show yourself to be a merchant in the Common Law Courts before you could get the benefit of the Law Merchant.[3]

Now the second stage of development of the Law Merchant

[1] Sir J. Fortescue.

[2] *E. g.* the Court established by 43 Eliz. c. 12, of which eight "grave and discreet merchants" were to be members, who were to determine all insurance cases in a brief and summary course, without formalities of pleadings or proceedings.

[3] *Vide post*, pp. 29, 30.

may be dated from Lord Coke's taking office in 1606, and lasts until the time when Lord Mansfield became Chief Justice in 1756, and during that time the peculiarity of its development is this: that the special Courts die out, and the Law Merchant is administered by the King's Courts of Common Law, but it is administered as a custom and not as law, and at first the custom only applies if the plaintiff or defendant is proved to be a merchant. In every action on a Bill of Exchange it was necessary formally to plead "secundum usum et consuetudinem Mercatorum" — according to the use and custom of merchants;[1] and it was sometimes pleaded that the plaintiff was not a merchant but a gentleman.[2] And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts; as a result little was done towards building up any system of Mercantile Law in England. The construction of that system began with accession of Lord Mansfield to the Chief Justiceship of the King's Bench in 1756, and the result of his administration of the law in the Court for thirty years was to build up a system of law as part of the Common Law, embodying and giving form to the existing customs of merchants. When he retired, after his thirty years of office, Mr. Justice Buller paid a great tribute to the service that he had done. In giving judgment in *Lickbarrow* v. *Mason*,[3] he said: "Thus the matter stood till within these thirty years. Since that time the Commercial Law of this country has taken a very different turn from what it did before. Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances put together. Before that period we find in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to the jury, and they produced no established principle. From that time

[1] Chalmers, Bills, Pref. p. 44.
[2] Cf. *Sarsfield* v. *Witherby* (1692), Carthew, 82.
[3] 2 T. R. 73.

we all know the great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard those principles stated, reasoned upon, enlarged, and explained till we have been lost in admiration at the strength and stretch of the human understanding, and I should be sorry to find myself under the necessity of differing from Lord Mansfield, who may truly be said to be the founder of the Commercial Law of this country." Lord Mansfield, with a Scotch training, was not too favourable to the Common Law of England, and he derived many of the principles of Mercantile Law, that he laid down, from the writings of foreign jurists, as embodying the custom of merchants all over Europe. For instance, in his great judgment in *Luke* v. *Lyde*,[1] which raised a question of the freight due for goods lost at sea, he cited the Roman Pandects, the Consolato del Mare, laws of Wisbury and Oleron, two English and two foreign mercantile writers, and the French Ordonnances, and deduced from them the principle which has since been part of the Law of England.[2] While he obtained his legal principles from those sources, he took his customs of trade and his facts from Mercantile Special Juries, whom he very carefully directed on the law; and Lord Campbell, in his life of Lord Mansfield, has left an account of Lord Mansfield's procedure. He says:[3] "Lord Mansfield reared a body of special jurymen at Guildhall, who were generally returned on all commercial cases to be tried there. He was on terms of the most familiar intercourse with them, not only conversing freely with them in Court, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided. Several of these gentlemen survived when I began to attend Guildhall as a student, and were designated and honoured as 'Lord Mansfield's jurymen.' One in particular I remember, Mr.

[1] 2 Burr. 883.

[2] Cf. the judgment of Willes, J., in *Dakin* v. *Oxley*, 15 C. B. N. S. 646, for similar authorities.

[3] Campbell's Lives of the Lord Chief Justices, II. 407, note.

Edward Vaux, who always wore a cocked hat, and had almost as much authority as the Lord Chief Justice himself."

Since the time of Lord Mansfield other judges have carried on the work that he began, notably Abbott, Lord Chief Justice, afterwards Lord Tenterden, the author of "Abbott on Shipping," Mr. Justice Lawrence, and the late Mr. Justice Willes; and as the result of their labours the English Law is now provided with a fairly complete code of mercantile rules, and is consequently inclined to disregard the practice of other countries. In Lord Mansfield's time it would have been a strong argument to urge that all other countries had adopted a particular rule; at the present time English Courts are not alarmed by the fact that the law they administer differs from the law of other countries.

48. THE MERCHANTS OF THE STAPLE[1]

By Bernard Edward Spencer Brodhurst[2]

'CENTURY after century,' says Dr. Le Bon in his Psychology of Peoples, 'our departed ancestors have fashioned our ideas and sentiments, and in consequence all the motives of our conduct. The generations that have passed away do not bequeath us their physical constitution merely; they also bequeath us their thoughts. We bear the burden of their mistakes, we reap the reward of their virtues.' The good as well as the evil that men do lives after them to the advantage or detriment of thousands of whom they never thought, and who, as likely as not, have never heard of them. A legal code, a method of legal procedure, may affect interests separated by centuries of time from those which in the first instance they were intended to serve. The civil law of Rome, embodied in the codes of Theodosius and Justinian in the fifth and sixth centuries, has been the guide and model for most of the legal systems of Europe, the common law of England and the Code Napoléon of France bearing eloquent testimony to the abilities of the great jurists who lived and laboured under the Roman Empire.

The staple system,[3] long since dead and gone, but once a

[1] This Essay was first published in the Law Quarterly Review, vol. XVII, 1901, pp. 56-76.

[2] Barrister of the Inner Temple, 1891; Oxford University, M. A. 1891, B. C. L. 1891.

Other Publications: Parish Councils Act, 1894; Law and Practice of the Stock Exchange, 1897.

[3] The principal authorities referred to in this article are: — A Dialoge or Confabulation between Two Travellers. By William Spelman, circa 1580. Edited by J. E. Latton Pickering. London, 1896. Statutes of the Realm, 1810-1824. Prolusiones Historicae. By the Rev. E. Drake. Salisbury, 1837. Commentaries on the City of London. By George

most important element in moulding and directing the commercial activities of this country, is an instance on a smaller scale of how an organization, which has for practical purposes completely vanished, may yet exert a modifying influence over some detail intimately connected with a people's well-being. . . .[1] The connexion between the merchants of the staple and bearer debentures is perhaps not very obvious at first sight. Nevertheless there is a connexion, and a not unimportant one. The law merchant in former days was not, as now, a part of the common law administered by the judges of the Queen's Bench; it had officials of its own, who exercised jurisdiction in the staple courts. Had it always been part and parcel of the common law, it is highly probable that cases connected with bills of exchange would appear in the law books earlier than the time of James I, seeing that they were probably well known in England at least three centuries previously. Owing to the fact that no mention of them occurs at an earlier date, it has been argued that the custom of treating bills of exchange as negotiable did not date from time immemorial (the reign of Richard I), and that if, in spite of that fact, these instruments have been recognized as being rendered negotiable through the instrumentality of the law merchant, there is no reason why debentures to bearer should not likewise be acknowledged as negotiable instruments without the intervention of a statute, although they are avowedly of comparatively recent origin. Now, if it could be shown that bills of exchange were dealt with in the courts of the staple as early as the reign of Richard I, this argument would obviously fall to the ground. It is, however, improbable that any records were kept of proceedings in these courts, and even if such records did exist, it would certainly be difficult to carry them back as far as the end of the twelfth century, if the instruments themselves were, as tradition relates,

Norton. 1869. English Gilds. By Toulmin Smith. London, 1870. Drei volkswirthschaftliche Denkschriften. By Reinhold Pauli. Göttingen, 1878. The Gild Merchant. By Charles Gross, Ph. D. Oxford, 1890. A History of the Custom Revenue in England. By Hubert Hall. London, 1892. The Growth of English Industry and Commerce. By W. Cunningham, D. D. Cambridge, 1896.

[1] [Here the author, in two pages omitted, comments on certain modern English cases. — Eds.]

introduced by the Venetians in the thirteenth. It is a possible, if not a very probable, hypothesis that some of the Assyrian contract-tablets in the British Museum are bills of exchange in a rudimentary form; but, so far as concerns the decision of the question whether the debentures to bearer called into existence for the mercantile convenience of the nineteenth century are or are not negotiable instruments, any inquiry on the point is hardly likely to be fruitful of important results. But the mere fact that greater light on the peculiar law by which the mercantile community was governed in the early phases of our history might effectually modify the commercial relations of to-day, proves that the institutions of our remote ancestors are occasionally of more immediate concern to us than the 'practical' man is apt to believe.

Involved in obscurity as the precise origin of the staple system is, it is not difficult to understand how it came into existence. Until almost the end of the reign of Edward III the policy of the English Government tended rather to discourage than to encourage trading abroad by its subjects. That may not have been the intention, but it was the effect of the regulations imposed. At that comparatively late period English merchants were practically excluded from foreign commerce, and their struggles against aliens were chiefly waged around the internal trade of the country. In the twenty-seventh year of Edward III we find it enacted that denizens and aliens alike may purchase wools, &c., in the counties, and convey them to the ports of embarkation, but that the process of exporting shall be exclusively in the hands of the foreigners, and that no subject of the realm shall export wools for himself in the name of an alien, nor have any agent abroad for that purpose, nor receive payment for the same abroad. Naturally enough such regulations as these caused a feeling of intense jealousy against the foreign merchants, particularly when they settled in this country and interfered with Englishmen, who, with some justification, considered that, as compensation for the disabilities they were under as regarded foreign commerce, they should at least be allowed a free hand in the country's internal trade. The citizens of London had long since formulated regulations of their

own under which aliens should trade. Unfortunately, however, they found themselves unable to enforce their rules, and when they complained to Edward I that they, who bore the common burdens of the town, were impoverished by the competition of foreigners, whose stay was now unlimited instead of, as formerly, restricted to forty days, that monarch refused to assist them. Edward was inclined to favour the merchants of Gascony and Flanders, and such confederations as the Hanseatic League, to which he gave a charter of incorporation and a special place of residence in the style-haus. One reason of the favour shown to them probably was that it proved easier to squeeze foreigners bringing their wares into the kingdom than subjects of the realm taking merchandise to the Continent. The latter were always apt to kick against what they believed to be undue exactions, while the former, needing the king's protection against the hostility of his English subjects, were ready to submit to the payment of tolls which might under other circumstances have struck them as exorbitant.

For another thing, Edward, in favouring the foreigner at the expense of the Englishman, was continuing the policy of his predecessors, and was also giving effect to the generally recognized principle that the foreigners' visits were to the advantage of the country. They imported wine and manufactured commodities, they exported the raw English products; and it is quite possible that, had it not been for them, England would in the early centuries have been without a foreign trade at all. It is highly probable that the policy was extended, as many a policy has been, beyond the period when it was desirable in a strictly economical view of this country's interests; but the clauses of the Great Charter had granted freedom of trade to the foreigner, and the towns, in their municipal regulations as well as by their representatives at Acton Burnel, had acquiesced in his encouragement. Aliens were, indeed, forced to pay customs at a higher rate than subjects, but this does not seem to have had any serious effect in counteracting the privileges they enjoyed. At any rate, the English shipowners appear to have been at a disadvantage during the greater part of the reign of Edward III, and it

was not until the Navigation Act of Richard II aimed a blow at the Gascon merchants that the Englishmen were able to thoroughly establish their footing in foreign trade. It was then, indeed, that the export trade of the country was beginning to be organized in the hands of the Merchant Adventurers and the Staplers.[1]

We must not, however, suppose that English activities were entirely confined to English soil; that would be to presume that a change has taken place in English character for which six centuries, howsoever eventful, would be quite inadequate to account. The end of the thirteenth and the beginning of the fourteenth centuries may be taken as the culminating point of a long period of steady and solid progress. The towns, which were the centres of commercial life, were in a highly prosperous condition, and the circumstances of the time were generally favourable to a rapid industrial advance. It was, therefore, only to be expected that, however Englishmen as a body might be hampered by governmental restrictions in forming commercial connexions abroad, a natural pushfulness would carry an individual here and there over all the obstacles set in his way. That this expectation is not unfounded is proved by the fact that an old writer mentions a mayor of the English merchants trading in Flanders as having been sent to settle certain disputes in the year 1313.[2] Such an official could only have belonged to some kind of recognized association, and it may accordingly be fairly assumed that English traders were by no means unknown on the Continent in the early years of Edward II, while it is highly probable that they frequented various marts in Brabant, Flanders, and Antwerp at a considerably earlier date.

However that may be, the institution which was subsequently to give the impetus to and exert a powerful influence over England's foreign trade became a distinct political organism in the reign of Edward III. It had long been the custom to hold fairs at all places of any importance throughout the kingdom. Thither the country folk would bring their produce for sale, and there, until the time of Edward III,

[1] Cunningham, English Industry and Commerce, i. 290, 291.
[2] Rymer, Foedera, ii. 202.

the greater part of the wholesale trade of the country was transacted, aliens being free to frequent them.[1] The policy of the fourteenth century, however, was to draw trade into a few selected towns in which were established continuous markets or staples, and not to be content with the occasional opportunities for trade which the intermittent fairs afforded. The same policy seems to have been pursued in Norway where Bergen was the staple for the Iceland trade, and in France where Philip did his utmost in 1314 to induce the English to frequent the staple at St. Omer instead of the fair at Lille.[2] That it was not always easy to give effect to the policy is evident from the proceedings relating to the royal staple at Bergen. The English persisted in trading direct with Iceland, and set at naught the regulations which governed transactions at the staple. The King of Norway thereupon confiscated the goods of English merchants throughout his dominions, a step which caused general consternation, since there were no Danish merchants trading with England against whom reprisals could be made. The contraband trade with Iceland, however, continued to be carried on in spite of these endeavours to put it down, until in 1476 the ravaging of the island and the slaughter of the royal bailiff was met by the prompt exclusion of the English from Bergen and the triumph for the time of the Hanseatic League.[3]

Still, in spite of constant violations, the staple system grew and throve. It is possible that the majority of merchants preferred to have one or more marts assigned, where English produce might regularly be supplied, so that those who wished to purchase it could frequent that recognized place of sale. In early times, when the stream of commerce was too feeble to permeate constantly to all parts of the country, the concentration of trade at certain staple towns was probably advantageous to its growth; particularly as the merchants assembling there might obtain a grant of political and judicial privileges, which they could not hope for unless they undertook to frequent the town and pay the dues regularly. Jurisdiction to enforce bargains must in particular have been

[1] Cunningham, English Industry and Commerce, i. 293.
[2] Ibid. [3] Ibid., i. 418.

a highly valued privilege at a time when the execution of contracts generally was not easily compellable by legal process, and was probably well worth the sacrifice of the freedom of trade which the staple regulations entailed. And although there were some traders who preferred to trade at other ports than the staple, and were willing to pay for royal licenses to do so, we may assume that the system met, on the whole, with the approval of the commercial classes. At any rate we find that the merchants of Scotland considered it desirable to fix a staple at Campfer in 1586 and not to have an open trade, and if the system had not possessed substantial advantages it would certainly not have met with so generally favourable a reception as it did. The objects of the staple system were fourfold:

Primarily it was a fiscal provision, its object being to facilitate the collection of the royal customs; and it is easy to see how much more simple a matter this collection would become if exportation were confined to a dozen English ports and one foreign centre, than if permitted at the absolute discretion of the producer or the merchant. To the king it was a matter of personal interest that the duties should be fully paid, since his private expenditure depended in those days upon the customs, and he was accordingly willing to confer such privileges as would be likely to entice traders to comply with the regulations of the system.

In the second place, the staple system fulfilled a useful function by ensuring the quality of exported goods. Commercial morality was none too high in those days, and the average trader fully appreciated the maxim *caveat emptor*. He had not the ingenuity of his nineteenth-century successor, but such tricks as he knew for the undoing of the consumer he too often practised with energy and perseverance. The staple checked his activities in this direction by providing a machinery for viewing and marking merchandise at the staple towns and places of export.[1] The statute 27 Edward III enacted that all wool for export should be brought to fifteen staple towns named therein, and that the weight should be certified by the mayor of the staple under his seal. When the staple

[1] Gross, Gild Merchant, i. 144.

town and the place of export were not identical (the port for York, for instance, was Hull; of Lincoln, St. Botolf; of Norwich, Yarmouth; of Westminster, London; of Canterbury, Sandwich; and of Winchester, Southampton), the wool was weighed a second time on reaching the port; but where the staple town was itself a seaport, as were Newcastle, Bristol, and Dublin, a single weighing sufficed. An indenture was then made between the mayor of the staple and the 'customers,' and the tolls were paid by the merchant, these being considerably heavier in the case of aliens than denizens.

Even when raw materials only were exported this precaution seems to have been desirable to prevent adulteration, and it no doubt became additionally so as merchandise manufactured in England began to be sold abroad. When the staple system began to decay and the precautions against fraudulent dealing were relaxed, the quality of goods quickly deteriorated. In a Dialogue or Confabulation between Two Travellers, written about the year 1580, we are introduced at a meeting consisting of a 'Cittye clothyer,' a 'contrye clothyer,' a husbandman and a merchant, at which a discussion takes place as to the causes of the deterioration of English-made clothing. It is generally agreed that the fault lies chiefly with the careless and inefficient methods of examining and marking woollen goods now in vogue, and the husbandman quaintly points out the difference between the good old times and the present. 'In times paste,' says he, 'we had clothes made that woold contynue a man's lyfe, where now yf yt be worne two or thre yeares yt is so thryd bare as a lowse can have no coverte.'

Thirdly, the system seems at one time to have been employed to replenish the stock of gold in this country. The idea was that the English merchants trading at Calais should refuse to take payment for their wares except in the precious metals, thus enticing the coin of other countries into England; and an old writer complains bitterly that, on a standard rate of exchange being established at Calais, the former practice was given up to the detriment of the kingdom. Adventurers, he tells us, have brought strange merchandise out of Flanders to destroy the manufactures in England, with

the result that the king and his lords are in difficulties for money. 'The whole wealth of the realm,' he says, 'is for all our rich commodities to get out of all other realms therefor ready money; and after the money is brought into the whole realm, so shall all people in the realm be made rich therewith. And after it is in the realm, better it were to pay 6*d.* for anything made in the realm than to pay but 4*d.* for a thing made out of the realm, for that 6*d.* is also spent in the realm and the 4*d.* spent out of the realm is lost and not ours.'[1]

Edward III, it is true, allowed payment to be made indifferently in gold, silver, or merchandise, so long as the payment took place in this country, and not more money was taken out of the kingdom than was brought in.[2] Richard II, however, provided that foreigners were to receive at least half the value of the wares they brought into the kingdom in English merchandise,[3] which, whatever may have been the intention, certainly had the effect of keeping coin in the country as well as pushing English goods abroad. Henry VI, after stating that the mint at Calais was 'like to be void, desolated, and destroyed,'[4] provided that the whole payment for wool, woolfels, and tin should be made in gold and silver without collusion, and that the bullion should be brought to the Calais mint. No part of the price was to be left outstanding on goods sold, in order that 'the same money may be brought within the realm without subtilty or fraud.'[5] In the third year of Edward IV, again, we find a petition from the Commons asking that all coin and bullion received at the staple should be brought to the mint at Calais and thence returned to England, showing that Parliament regarded the system as a method of replenishing the gold stocks of the kingdom. The means adopted may not accord with the economic principles of modern times, but there was possibly some justification for them in an age when there was not a constant flow of gold to our shores from Africa, America, and Australia.

Fourthly, the system provided a special tribunal designed

[1] A Treatise concerning the Staple, in Pauli, Drei volksw. Denk., pp. 19, 32.
[2] 27 Edw. III. c. 3, 14. [3] 14 Rich. II. c. 1.
[4] 8 Henry VI. c. 17. [5] Ibid. c. 18.

'to give courage to merchant strangers to come with their wares and merchandise into the realm.'[1] The provision of a satisfactory machinery for the recovery of debts was, by the end of the thirteenth century, becoming a prime necessity of the growth of commerce, and the staple system afforded a convenient basis on which to build up a judicial procedure. Wherever a market or fair was held it had been customary from a very remote period that, when disputes arose as to the terms of a bargain, the questions at issue should be decided by four or five of the merchants present on the spot, who were expected to apply the principles and customs recognized as obtaining generally among the trading classes. This practice is referred to in a charter of Henry III as having prevailed for many years previously,[2] and it was this informal judicial procedure upon which was now conferred the sanction of parliamentary authority. Justice, it was ordained, was to be done to the foreigner from day to day and hour to hour, according to the law of the staple or the law merchant, and not according to the common law or particular burghal usages.[3] Alien merchants were to be impleaded before no tribunal but that of the mayor and constables of the staple.[4] These officials were to be elected annually in every staple town by the commonalty of the merchants, aliens as well as denizens. They were empowered to keep the peace, and to arrest offenders for trespass, debt, or breach of contract. The mayor was, further, to have recognizances of debts, a seal being provided for the purpose.[5]

The court of the staple had no cognizance of criminal offences, unless when the avenger of blood chose to prosecute at his own peril.[6] Speaking of the court of the staple at Calais, Mr. Hall says[7] that it was a tribunal analogous in many respects to the local councils of the north and west of England under Tudor sovereigns. Its main object was to draw all civil actions in which staplers were in any wise con-

[1] 27 Edw. III. c. 2. [2] Norton's City of London, 324.
[3] 27 Edw. III. c. 2. [4] Ibid. c. 8. [5] Ibid. c. 9.
[6] Hall's History of the Customs, i. 34. Chapter 8 of 27 Edward III gave jurisdiction to the staple courts to try felonies committed by or against merchants of the staple or their servants, but this power was withdrawn by 36 Edward III. c. 7.
[7] Ibid. i. 33.

cerned within its jurisdiction, in order to expedite the course of justice and to lessen the expenses incident thereto. In addition to trying civil actions there appears to have been, in that instance, a general jurisdiction to deal with all matters concerning the well-being of the mercantile community; for we find that the mayor, in a full court of all the merchants, was to assign to each merchant lodgings suitable for his entertainment, which he must frequent unless he could show good cause to the contrary. But this extended jurisdiction was granted, no doubt, after the staplers of Calais had been incorporated, and had reference only to the members of the corporation.

It was further enacted, by the statute already referred to, that the mayors, sheriffs, and bailiffs of the towns where the staples were held, should aid the mayors and constables of the staples in the execution of their duties.[1] This must be read as referring to those cases only in which these offices were not combined, or, perhaps, as relating to a time before municipal economy had seen the advantage of combination. For we find, in Toulmin Smith's English Gilds,[2] that at the annual induction of the mayor of Bristol 'there was to be redde the Maires Commission of the Staple with the *dedimus potestatem*, and upon the same the Maire there to take his othe, after the fforme and effect of a Cedule enclosid withyn the seide *dedimus potestatem* yf it be then y-come.' And on the same day the mayor was to call before him his sergeants to be bound with their sureties for the proper execution of their offices during the year 'as wele in the Staple court as otherwyse.' This record was written by Robert Ricart, who became Town Clerk of Bristol in 1497. He tells us that he received instructions from one Spencer, the mayor for that year, 'to devise, ordaigne, and make this present boke for a remembratif evir hereafter, to be called and named the Maire of Bristowe is Register, or ellis the Maire is Kalendar.' Now, by a charter granted to Bristol in the forty-seventh year of Edward III (1373), jurisdiction was given to the mayor and sheriffs, to hear and determine all suits relating to all contracts, covenants, accounts, debts, trespasses, pleas, and plaints arising

[1] 27 Edw. III. c. 21. [2] P. 419.

within the town of Bristol, its precincts and suburbs, with the exception of those cases only in which a writ of error should lie to the justices in eyre, or of gaol delivery, and also of 'inquisitions and determinations of customs and subsidies of wool, leather, skins, felts, and other customs and subsidies of us and our heirs by cocket[1] or otherwise belonging to us or our heirs from the grant of our faithful people and subjects.'[2] These words would seem to show that the officials of the staple and of the borough were not identical in 1373. On the other hand, since Ricart writes as if there were nothing unusual or new in the execution of the duties of the staple by the mayor of the borough, we must conclude that the amalgamation of the staple and the ordinary jurisdictions took place in this instance nearer to 1373 than to 1479. Indeed, the mayor of the staple town, where there was one, would seem to be a most fit and proper person to execute the duties attaching to the staple, since 27 Edward III specifically required one who was well versed in the law merchant to fill the office of mayor of the staple, and no one was more likely to possess the necessary qualification than the man chosen by the burgesses as their representative and head. It would not be safe to conclude that it became at any time a general practice for the mayor of the borough to discharge the duties of mayor of the staple, since we find that at Drogheda the mayor and sheriffs of the borough one year became mayor and constables of the staple in the following year, and master and wardens of the Gild of Merchants in their third year. But as the mayor and sheriffs of Waterford were, by virtue of their office, mayor and constables of the staple at the same time,[3] it is probable that such a combination was not unusual.

The foreign merchant was, it appears, not compellable originally (whatever may have been the case at a later date) to bring his case in the staple court: he might, if he so preferred, sue in the courts of common law, and have the law

[1] A cocket was a parchment scroll sealed and delivered by the officers of the custom-house to merchants as a warrant that 'their merchandises are customed.'

[2] Seyer's Bristol Charters, pp. 52 et seq.

[3] Gross, Merchant Gild, i. 146, 147 and notes.

of the land applied instead of the law merchant.[1] And although the justices in eyre, of assise, and of the Marshalsea, were not to intervene in matters of which the mayor of the staple had cognizance,[2] there was an appeal to the Chancellor and the King's Council, if the mayor had unduly favoured either party.[3] It would seem probable, also, that the Chancellor had an original as well as an appellate jurisdiction; for in the thirteenth year of Edward IV we find that official stating, in a suit brought before him in the Star Chamber by a foreign merchant, that the plaintiff was not bound to sue in the ordinary courts, 'but he ought to sue here, and it shall be determined by the law of nature in Chancery.' The administration of justice in the case of foreigners was, he said, to be '*secundum legem naturae*, which is called by some the law merchant, which is the law universal of the world.' In the case in question the justices certified that, since the plaintiff was an alien, his goods were not forfeited to the Crown as a waif, though they would have been had he been a subject.[4] We may, however, surmise that proceedings in the Star Chamber were exceptional, and were possibly only resorted to when the dispute concerned property of more than usual value. Under ordinary conditions the courts of the staple would be the most expeditious and satisfactory means of settling those differences of opinion which were as certain to arise in the course of mercantile transactions in the fourteenth and fifteenth centuries as they are to-day.

If an inquest was held to try the truth of any question in the staple courts, the jury was to consist wholly of denizens, when both parties to the suit were subjects; wholly of aliens, when both of the parties were aliens; and half of denizens and half of aliens, when one of the parties was a subject and the other a foreigner.

The statute staple — the recognizance 'in the nature of a statute staple' afterwards became a usual form of security in the ordinary courts — was introduced in the staple courts. It was a bond of record acknowledged before the mayor of the staple, in the presence of one or all the constables. To

[1] 27 Edw. III. c. 8. [2] 27 Edw. III. c. 5. [3] Ibid. c. 21.
[4] Blackburn on Sale, 317 (2nd ed.); and see Malynes, Lex Merc. 311.

all obligations made on recognizances so acknowledged it was required that a seal should be affixed, and this seal of the staple was all that was necessary to attest the contract. The seal belonging to the staple court of Poole is still in existence, and bears the words 'Sijill: Staple in Portu de Pole.'[1]

With the object of giving effect to the staple regulations a number of the most considerable towns in the kingdom were named as staple towns.[2] To these centres the principal raw commodities of the kingdom — such as wool, woolfels, leather, tin, and lead — were brought for sale and exportation, and were in consequence known as the 'staple' wares of England, though the term came in time to be applied almost exclusively to wool. In speaking of the growth of duties on exports and imports Blackstone says: —

'These (i. e. the customs on wool, skins, and leather) were formerly called the hereditary customs of the Crown, and were due on the exportation only of the said three commodities, and of none other: which men styled the staple commodities of the kingdom, because they were obliged to be brought to those ports where the King's staple was, in order to be there first rated and then exported.'[3]

The staple was sometimes situated abroad, as at Bruges or Calais, and less frequently at Antwerp, St. Omer, or Middleburgh; sometimes at a number of English towns. Its history is involved in considerable obscurity until the reign of Edward III, but it appears to have been generally maintained in one of the wealthy cities of Flanders, no doubt because most of the English wool went thither to be made into cloth. It is true that we find Edward III, when attempting in the second year of his reign to establish freedom of

[1] Gross, Gild Merchant, i. 142, n. 7.

[2] Duke in his Prolusiones Historicae suggests that the word staple originally meant padlock, and that its application in this sense arose from the fact that when the wares, on which customs were payable, were brought to the seaports for exportation, they were bonded in the royal warehouses under lock and key, until such time as they could be sold and the duties on them paid from the proceeds; that in course of time the word was applied to the goods so treated, and, lastly, to the merchants who dealt in the goods. But this seems merely fanciful. See Skeat, Etym. Dict. *s. v. Staple,* and Littré, *s. v. Étape.*

[3] Comm. i. 314, 315.

trade according to the tenor of the Great Charter, declaring that 'the staples beyond the sea *and on this side*, ordained by kings in times past,' should cease.[1] But in the seventeenth year of the same reign the merchants petitioned that the staple of wools might be removed to England, whereby would arise the following benefits: the price of wool would be enhanced; less merchandise would be lost at sea by English merchants; less bad money would be introduced into the kingdom; the king would have 40*s*. from every sack at the expense of aliens only; and the petitioners might receive an assignment of one half the customs paid by aliens in discharge of the debts due to them from the Crown. And, again, in the following year, it is stated 'that the staple is ill-situate at Bruges. Formerly Italian and Spanish buyers were numerous; now the great cities of Flanders will not open the staple to strangers beyond Flanders.'[2] It would, therefore, appear probable that such English staples as did exist were of little importance until the great Statute of Staple of 1354[3] temporarily abolished their foreign rivals and brought them into prominence. With some subsequent minor alterations, this enactment provided for the regulation of the system so long as it continued an active force in English history. . . .[4] Even in the reign of Henry VII, the Merchants of the Staple were a body of no small importance, although the system had been falling into decay during the reigns of several of the first Tudor's predecessors. The process of disintegration had commenced with the very considerable growth of the English cloth manufacture in the reign of Henry IV. In 1464 a statute of the fourth year of Edward IV recites that 'owing to subtil bargains made in buying wools before that the sheep, that bear the same, be shorn,' the clothmakers of the realm can obtain none, 'to the great grief of them which have been accustomed to have their living by the mean of the making of cloth,' and consequently forbids such bargains for the future. Many other Acts of the same reign

[1] 2 Edw. III. c. 9.
[2] Hall's History of the Customs, i. 215.
[3] 27 Edw. III. stat. 2.
[4] [Here the author, in six pages omitted, discusses the shifting of the staple towns and the date of the origin of the Company. — Eds.]

show a solicitude for the growth of the home manufacture, and it is clear that the policy which in 1338 had forbidden the wearing of cloth made out of England, except to the royal family, and had invited, with the assurance of protection and privileges, 'all cloth-workers of strange lands of whatsoever country they might be,' had resulted in making England the principal centre of the cloth trade by the middle of the fifteenth century. The proverb that 'riches follow the staple' was ceasing to be appropriate. In Henry VI's reign the revenue from staple commodities had fallen to £12,000 from £60,000, which accrued from the same source in the time of Edward III. This led to an enactment revoking all licenses to trade elsewhere than to Calais saving those granted to the Queen, the Duke of Suffolk, the Prior of Bridlington, and three others, and with the exception also, it would seem, of merchants passing the 'Streyhts of Marrock,' no doubt Gibraltar. These prohibitions, however, were apparently ineffectual, and by the close of the reign the Merchants of the Staple had reached a low ebb of prosperity. The seas were unsafe; disbanded captains received their rewards at the expense of the stapler's monopoly; while the Merchant Adventurers had come upon the scene, and, trading under more favourable auspices than their rivals of the staple, promised to outstrip them in the race for commercial supremacy.[1]

During the reign of Henry VIII the Merchants of the Staple presented a petition to the Crown setting out their grievances. They pointed out that they had from time immemorial enjoyed a monopoly of traffic in the staple commodities of the kingdom, and reminded Cardinal Wolsey that they had exercised the privilege to the complete satisfaction of the Government. During the Wars of the Roses the garrison of Calais, their pay being eight years in arrear, had risen and compelled the merchants to satisfy their claims. Later had come bad seasons; a murrain had broken out among the flocks; wool was in consequence scarce, and production limited to wealthy graziers, who held back for advanced prices. The war had prevented foreign buyers from coming to Calais, the French, who formerly took 2,000 sacks of wool yearly,

[1] Hall's History of the Customs, i. 36.

now accepting only 400. A continual loss had been suffered on exchange, so that 'there has not been so little loste as £100,000.' The consequence was that the members were falling off, and the fellowship was in process of decay.[1] The sad condition of the Staplers seems to have met with little sympathy from the Government, although we do find that by a statute of the fifth year of Edward VI only Merchants of the Staple at Calais and their apprentices were to be allowed to buy wool, and that the Merchants of the Staple as well as the Merchant Adventurers were exempted from Elizabeth's Navigation Act.[2]

The truth was that the system had by this time outlived the purposes of its creation. The principal feature of the economic history of England from the accession of the Plantagenets for some two centuries and a half was the export trade in wool, and the staple system was a useful, almost a necessary, machinery for the direction of that trade. Gradually, as the manufacture of cloth sprang up, and a trade in that commodity began to take the place formerly held by raw wool, the usefulness of the system declined; and the Staplers, with their anxiety to maintain their monopoly on the lines of the most rigid conservatism, ended by being a clog on the foreign trade of England, with which the ideas of the time were out of harmony. The loss of Calais in 1558 must practically have given the Merchants of the Staple their deathblow; but if anything further was required to complete the downfall, it was administered by an Act of 1660, which totally prohibited the export of wool, thereby producing such a glut of the material in the English markets that it had to be followed by the curious enactment which for nearly 150 years compelled every one to be buried in a woollen shroud.

Perhaps as compensation for this blow Charles II, in 1669, granted a charter of incorporation and a common seal to the Staplers under the title of 'The Mayor, Constables, and Company of Merchants of the Staple of England.' Since the conferment of this dignity the company has withdrawn itself from the fierce glare of public life, although it emerged

[1] Hall's History of the Customs, i. 37-39.
[2] Cunningham's English Industry and Commerce, ii. 21.

therefrom in the year 1887, and successfully maintained an action against the Bank of England.[1] The only other vestige of its former prosperity is Staple Inn in Holborn, near to which, tradition has it, was once the Wool Market of London, and at which the dealers in wool had their quarters. More fortunate than they, the Society of Merchant Adventurers were, we notice, represented by their Master upon the Queen's visit to Bristol in November last. Yet they, too, are now little but a voice, for the merchant princes of the Tudor age have fallen from their high estate, and their place knoweth them no more.

[1] 21 Q. B. D. 160.

49. CONTRIBUTIONS OF THE LAW MERCHANT TO THE COMMON LAW [1]

By Francis Marion Burdick [2]

IN a recent book of unusual originality, we find the following statement: "The phrase 'law merchant,' like many another, is uncritically employed in handy explication of seeming anomalies. As objections to the Mosaic cosmogony, presented by the existence of fossils, were allayed by convenient reference to omnipotence, so perplexing questions relating to negotiable instruments are waived by unthinking allusion to the 'law merchant.' Omnipotence and law merchant work their arbitrary will, and are irreducible and distracting." [3] A little later in the volume, the author writes: "As a matter of fact, and not merely of phrase, may we not even ask whether there is a law of merchants, in any other sense than there is a law of financiers or a law of tailors? Frequent use of the word has almost produced the impression that as there was a civil law and a canon law, so also there was somewhere a 'law merchant,' of very peculiar authority and sanctity; about which, however, it is now quite futile to inquire and presumptuous to argue."

Mr. Ewart does not claim that these views accord with

[1] This Essay was first published in the Columbia Law Review, vol. II, 1902, pp. 470-485, under the title "What is the Law Merchant?"

[2] Dwight professor of law in Columbia University since 1891. Hamilton College, A. B. 1869, LL. B. 1872, LL. D. 1895; professor of law and history in Hamilton College, 1882-1887; professor of law in Cornell University, 1887-1891.

Other Publications: Cases on Torts, 1895; Cases on Partnership, 1898; Law of Partnership, 1899; Cases on Sales, 1901; Law of Sales, 1901; Essentials of Business Law, 1902; Law of Torts, 1905; editor of the department of Law in Johnson's Universal Cyclopedia.

[3] Ewart on Estoppel, 370.

the opinions which pervade judicial decisions and standard treatises. On the contrary, he frankly admits that judges and writers of the greatest eminence and learning have held views diametrically opposed to his. The object of the present article is to inquire whether The Law Merchant ought to be dismissed as a mere phrase.

Law Merchant Procedure

It is quite certain that, as early as the middle of the thirteenth century, cases between merchants were conducted according to a procedure quite unlike that of common law courts. Bracton tells us that the summons in such cases need not be served fifteen days before the defendant was bound to answer, as it had to be in common law actions. His language is: "Likewise, on account of persons who ought to have speedy justice, such as merchants, to whom speedy justice is administered in courts of pepoudrous, . . . the time of summons is reduced."[1] Again, in actions against merchants "the solemn order of attachments ought not to be observed," Bracton declares, "on account of the privilege and favor of merchants."[2] Nor are these the only respects in which the procedure of the ancient law merchant differed from that of the common law. In an action of debt, the common law permitted the defendant to wage his law, that is to deny the debt by his own oath, and by the oaths of eleven neighbors, or compurgators, who swore that they believed his denial was the truth.[3] This was not allowed, however, by the law merchant, in case the plaintiff supported his claim by a tally and two or more witnesses,[4] or in case the action was upon a contract between merchant and merchant beyond the seas.[5]

The very name of the earliest courts in which mercantile cases were tried indicates the character of their procedure. They are called "pepoudrous," says Coke, "because that for contracts and injuries done concerning the fair or market,

[1] Bracton, De Legibus Anglicæ, l. v. f. 334 a.
[2] *Ibid.* l. vi, 444 a.
[3] Pollock and Maitland's History of English Law, Vol. 2, p. 212. Select Civil Pleas, pl. 146 (1203).
[4] Clermont's Fortescue, 121, note.
[5] *Ibid.* 120.

there shall be as speedy justice done for the advancement of trade and traffick, as the dust can fall from the foot, the proceedings there being *de hora in horam*."[1] And Blackstone declares: "The reason of their original institution seems to have been to do justice expeditiously among the variety of persons that resort from distant places to a fair or market; since it is probable that no inferior court might be able to serve its process, or execute its judgments, on both, or perhaps either, of the parties; and therefore, unless these courts had been erected, the complainant must have resorted, even in the first instance, to some superior judicature."[2]

The expedition of these courts was in striking contrast with the slow and stately procedure of the common law tribunals, which were not always open to suitors. Their proceedings, even during term time, were not from hour to hour throughout the day. They took plenty of time to deliberate. Sir John Fortescue, writing about the middle of the fifteenth century, gives this account of them: "You are to know further, that the judges of England do not sit in the King's courts above three hours in the day, that is from eight in the morning till eleven. The courts are not open in the afternoon. The suitors of the court betake themselves to the *pervise*, and other places, to advise with the Sergeants at Law, and other their counsel, about their affairs. The judges when they have taken their refreshments spend the rest of the day in the study of the laws, reading the Holy Scriptures, and other innocent amusements at their pleasure. It seems rather a life of contemplation than of action."[3]

[1] Coke, Fourth Institute 272.

[2] 3 Blackstone's Commentaries 33. Blackstone rejects the etymology of pepoudrous given by Coke, and prefers that suggested by Barrington, in his Observations on the Statutes, who derives the term from *pied puldreaux*, which, in old French, signifies a pedlar. "The court of Pipowder" (as Barrington spells the word,) is "the court of such petty chapmen," or pedlars and "low tradesmen" as resort to fairs and markets. See Barrington's Observations, (2d ed. 1766) 321, 322. To Barrington and Blackstone, courts pepoudrous were only a name. It was easy for them to picture these tribunals as of small consequence, and as dealing with trifling disputes. In Coke's time, they held an important place in the judicial system. Two centuries earlier, they had so extended their jurisdiction by an ingenious fiction as to call forth an act of parliament reducing them to their original limits. 17 Ed. iv. Ch. 2.

[3] Sir Henry Spellman offers a very different and less complimentary explanation of the judicial habit of limiting sittings to the forenoon.

Merchants were men of action, and the contemplative habit of English common law judges did not fall in well with their necessities. They insisted upon having not only justice but speedy justice. This was secured to them in a measure, as we have seen, by the institution of a court pepoudrous as an incident of every fair and market throughout England. The statute of the Staple[1] provided additional courts for the relief of merchants. One of its chief objects was declared to be, "to give courage to merchant strangers to come with their wares and merchandise into the realm."[2] It recognized the fact "that merchants may not often long tarry in one place for levying of their merchandises," and accordingly promised "that speedy right be to them done from day to day, and from hour to hour, according to the laws used in such staples before this time holden elsewhere at all times."[3] It provided for the election of a mayor and constable of the staple, by the merchants of each staple town, and gave to such mayor complete jurisdiction over all mercantile transactions.[4] In order to secure these mercantile courts from encroachments on the part of the common law tribunals, the statute declared that, "In case our bench or common bench, or justices in eyre or justices of assize, or the place of the marshalsea, or any other justices come to the places where the said staples be, the said justices nor stewards, nor marshals, nor of other the said place shall have any cognizance there of that thing,

This is his language. "It is now to be considered why high courts of justice sit not in the afternoon . . . Our ancestors and other northern nations being more prone to distemper and excess of diet used the forenoon only, lest repletion should bring upon them drowsiness and oppression of spirits. To confess the truth our Saxons were immeasureably given to drunkenness." He adds that judges do sit from morning to evening, in great causes, but without dinner or intermission, for "being risen and dining, they may not meet again." It is because of this tendency to drunkenness, he thinks, that jurors were prohibited from having meat, drink, fire or candle light "till they agreed of their verdict." — Spellman's The Original Terms (1614), Sec. V. Chap. 1.

[1] 27 Ed. III. Statute 2 (1353:) This statute enacted "That the staple of wools, leather, woodfels and lead shall be perpetually holden at the places underwritten, that is to say, for England, at Newcastle upon Tine, York, Lincoln, Norwich, Westminster, Canterbury, Chichester, Winchester, Exeter and Bristol; for Wales, at Kaermerdyn; and for Ireland at Devylen, Waterford, Cork and Drogheda."

[2] *Ibid.* ch. 2.

[3] *Ibid.* ch. 19, § 2.

[4] *Ibid.* ch. 21 and ch. 8.

which pertaineth to the cognizance of the mayor and ministers of the staple."[1]

That the procedure in these statutory courts of the staple towns was not that of the common law, but was that of the law merchant, is expressly stated in the statute. Chapter 21 required the mayor of the staple to have "knowledge of the law merchant," and "to do right to every man after the law aforesaid." Chapter 8 provided "that all merchants coming to the staple shall be ruled by the law merchant, of all things touching the staple, and not by the common law of the land, nor by the usage of cities, boroughs or other towns;" although it gave merchants the right to sue before the justices of the common law if they preferred to do so. The language of chapter 20 is very significant: "Item, because we have taken all merchants strangers in our said realm and lands into our special protection, and moreover granted to do them speedy remedy of their grievances, if any be to them done, we have ordained and established, That if any outrage or grievance be done to them in the country out of the staple, the justices of the place where such outrages shall be done shall do speedy justice to them after the law merchant from day to day and from hour to hour, without sparing any man or to drive them to sue at the common law."

The procedure, then, in the statutory courts of the staple was that of the law merchant, and was very different from that of the common law. It was a procedure with which merchants were familiar. The statute does not describe it, but assumes that its peculiarities are a matter of common knowledge. It was the procedure which was then in use in such staples, or markets, "holden elsewhere."[2] It was summary, swift and sure. It was the procedure of courts pepoudrous. It was the procedure of "the Law Merchant which prevailed in similar form throughout Christendom."[3] Whenever a merchant was a suitor in one of these courts, an ancient writer assures us, he was "*in loco proprio*, as the fish in the water, where he understandeth himself by the custom of merchants,

[1] *Ibid.* ch. 5. [2] *Ibid.* ch. 19, § 2.
[3] Cunningham's Western Civilization, Vol. 2, p. 95.

according to which merchants' questions and controversies are determined."[1]

The Substantive Law Merchant

But the ancient law merchant was something more than a system of procedure, devised to secure the speedy settlement of merchants' controversies. It was a body of substantive law. It is referred to as such in several of the extracts given above from the statute of the staple. In chapter eight, as we have seen, it is contrasted with "the common law of the land," and it was provided that pleas concerning mercantile matters should be sued "before the justices of the staple by the law of the staple," (which had previously been defined as the law merchant,) while "pleas of land and of freehold shall be at the common law."[2] It was recognized as a distinct body of substantive law in a charter of Henry III,[3] which recites that "pleas of merchandise are wont to be decided by law merchant in the boroughs and fairs." Fortescue contrasts it with the common law, when he declares that "in the courts of certain liberties in England, where they proceed by the law merchant, touching contracts between merchant and merchant beyond seas, the proof is by witnesses only."[4]

Coke repeatedly refers to the lex mercatoria as a body of substantive law. In his notes to § 3, of the First Institute, he says, "There be divers laws within the realm of England," which he proceeds to name. The fourth class of these laws is "The common law of England," while the twelfth is "Lex Mercatoria, merchant, &c." In the fourth institute, he writes: "The Court of the Mayor of the Staple is guided by the law merchant, which is the law of the staple. . . . This Court (though it was far more ancient) is strengthened and warranted by act of parliament.[5] . . . It was often-

[1] Malynes' Lex Mercatoria, Chap. XVI. p. 308 (1622).
[2] 27 Ed. III, St. 2, ch. 8, § 7.
[3] Norton's History of London, Book II, Chap. XIX. The ninth charter of Henry III, granted 1268.
[4] Clermont's Fortescue, 120.
[5] The author refers to 27 Ed. III St. 2 and quotes at length from ch. 21.

times kept at Callice, and sometimes at Bridges in Flanders, and at Antwerpe, Middleburgh, &c., and therefore it was necessary that this Court should be governed by the law merchant." [1]

Malynes, in his "Lex Mercatoria or Ancient Law Merchant," [2] writes for the man of business rather than for the lawyer, but he has much to say of the law merchant. In his "Epistle Dedicatory" to King James, he declares the "Law Merchant hath always been found *semper eadem;* that is, constant and permanent, without abrogation, according to the most ancient customs, concurring with the Law of Nations in all Countreys." He informs "The Courteous Reader," in his preface, that he "intitled the book according to the ancient name of Lex Mercatoria, and not Jus Mercatorium; because it is a customary law, approved by the authority of all kingdoms & commonwealths, and not a law established by the soveraignty of any Prince, either in the first foundation, or by continuance of time." Earlier in the preface, he writes, "Reason requireth a law not too cruel in her frowns, nor too partial in her favors. Neither of these defects are incident to the Law Merchant, because the same doth properly consist of the custom of merchants, in the course of traffick, and is approved by all Nations, according to the definition of Cicero, *Vera lex est recta Ratio Natura congruens, diffusa in omnes constans sempiterna.*" Later, he refers to the Lex Mercatoria as "made and framed of the Merchants' Customs and the Sea Laws." Several chapters of the book are devoted to an account (rather desultory it must be admitted) of the various methods for the determination of merchants' causes and controversies. Seafaring causes, as he styles them, are determined in the Admiralty Court. Other controversies may be decided either by arbitrators chosen by the parties, or by merchants' courts, or by the chancery, or by the common law courts. Even when actions are brought in the courts of common law by merchants, he declares, "That the Law Merchant is predominant and over-ruling, for all Nations do frame and direct their

[1] Coke's Fourth Institute, Chap. XLVI.
[2] The first edition was published in 1622.

judgments thereafter, giving place to the antiquity of Merchants' Customs, which maketh properly their Law, now by me methodically described in this Book." [1]

Of the common law, in its specific sense, that is of the system of legal rules and procedure administered in the common law courts, the author seems to have had a poor opinion. Among other flings at it is this: "In chancery every man is able by the light of nature to foresee the end of his cause, and to give himself a reason therefor, and is therefore termed a cause; whereas at the common law, the Clyent's matter is termed a case, according to the word *Casus*, which is accidental; for the Party doth hardly know a reason why it is by Law adjudged with or against him." After thus paying his compliments to the technical, dilatory and uncertain common law, he proceeds: "Merchants' causes are properly to be determined by the Chancery, and ought to be done with great expedition; . . . for the customs of merchants are preserved chiefly by the said court, and above all things Merchants' affairs in controversie ought with all brevity to be determined, to avoid interruption of traffick, which is the cause that the Mayor of the Staple is authorized by several acts of parliament to end the same, and detain the same before him, without dismission of the common law." [2] In a later chapter on "The Ancient Government of the Staple," the author says that "the laws and ordinances made by the said merchants" in the staple towns "were called staple laws," [3] which, as we have seen, is but another name for the law merchant.

The controversy between the admiralty and the common law courts for jurisdiction, which culminated during the chief justiceship of Lord Coke, elicited several publications in which the law merchant plays a prominent part. Perhaps, the most important of these works are Godolphin's "View of Admiralty Jurisdiction," [4] Zouch's "Jurisdiction of the Admiralty," [5] and Prynne's "Animadversions." [6]

Godolphin quotes with approval the statement of Sir John

[1] Lex Mercatoria, Chap. XIV. [2] Lex Mercatoria, p. 303.
[3] *Ibid.* p. 337. [4] Published 1661. See pp. 126, 127.
[5] Prepared for publication prior to 1663, but first published in 1686.
[6] Published in 1669.

Davies [1] that the Law Merchant as a branch of the general law of Nations has "been ever admitted, had, received by the Kings and people of England, in causes concerning merchants and merchandizes and so is become the law of the land in these cases." He looks upon the law merchant as "a law of England, though not the law of England." Upon this point, he agrees with Lord Coke and treats the common law as well as the law merchant as two distinct but constituent elements of English jurisprudence.

Zouch calls attention to the fact that "Sir Edward Coke, in his comment upon Littleton, mentions the Law Merchant as a Law distinct from the Common Law of England," adding, "And so doth Mr. Selden mention it in his Notes upon Fortescue." He then quotes at length from Sir John Davies' "Manuscript Tract touching Impositions,"[2] laying especial stress upon the writer's views, probably because of his eminence as a common lawyer and of the friendly personal relations which he had sustained with Coke. According to the writer, "Both the common law and Statute laws of England take notice of the law merchant, and do leave the causes of merchants to be decided by the rules of that law; which Law Merchant, as it is a part of the Law of Nature and Nations, is universal, and one and the same in all countries of the world." "Whereby," remarks Dr. Zouch,[3] "It is manifest that the causes concerning merchants are not now to be decided by the peculiar and ordinary laws of every country, but by the general laws of Nature and Nations." Sir John Davies is quoted further as saying: "That until he understood the difference betwixt the Law Merchant and the Common Law of England, he did not a little marvel, that England, entertaining traffick with all nations of the world, having so many ports and so much good shipping, the King of England being also Lord of the Sea, what should be the cause that, in the books of the Common Law of England there are to be found so few cases concerning merchants or ships:

[1] Davies on Impositions, written about 1600 and first published 1656.
[2] As Dr. Zouch refers to this work as a "manuscript tract," it would appear that his own treatise must have been written before the publication of "The Impositions" in 1656.
[3] The Jurisdiction of Admiralty, 89.

But now the reason thereof was apparent, for that the Common Law of the Land did leave those Cases to be ruled by another Law, namely, the Law Merchant, which is a branch of the Law of Nations."

Prynne points to this absence of "precedents of suits between merchants and mariners in the common law courts" as conclusive evidence that those courts had not formerly claimed jurisdiction of them, and declares that actions for breach of maritime contracts had always been "brought in the Admiral's Court, and there tried, judged in a summary way, according to the laws of merchants and Oleron, not in the King's Courts at Westminster, who proceeded only by the rules of the Common Law."[1]

The Law of Merchants a True Body of Law

It is apparent, we submit, from the foregoing authorities, that for several centuries there was a true body of law in England which was known as the law merchant. It was as distinct from the law administered by the common law courts, as was the civil or the canon law. It was a part of the unwritten law of the realm, although its existence and its enforcement had been recognized and provided for by statutes. Until the Seventeenth Century, it was rarely referred to in common law tribunals. Courts pepoudrous, staple courts or courts of merchants, the admiral's court and the Chancery dealt with the cases which were subject to its rules. During the seventeenth century staple courts expired[2] with the decay of the staple trade; and the courts pepoudrous[3] lost much

[1] Prynne's Animadversions, 83. On pp. 95, 96, he speaks of the Admiral's Court as proceeding according to the "law of merchants, Oleron and the civil law," and on p. 102 he refers to the "civil law, of merchants and Oleron."

[2] Coke intimates that the only staple court in existence when he wrote his Fourth Institute was that "holden at the Wool Staple at Westminster." Fourth Institute, p. 237, Prynne says "the Court of the Mayor of the Staple is now expired," Animadversions, p. 175.

[3] It is rather curious that these courts gained a new lease of life in some of the American Colonies. In 1692 New York passed an act "for the Setling of Affaires and Marquets in each respective City and County throughout the Province," which provided for a "Governor or Ruler" of each fair with power "To have and to hold a court of Pypowder together with all Libertys and free customs to such appertaining," and

of their importance. Their decisions were subject to review by common law judges, who did not hesitate to pursue towards them the policy which they had adopted towards the admiralty, of limiting their jurisdiction within the narrowest bounds, and of enticing or coercing their suitors into the courts of common law.

While the staple courts and kindred tribunals were dying out, mercantile cases were necessarily finding their way into the common law courts. How should the common law judges deal with them? These judges were not selected, as the mayors of the staple had been chosen, because of their knowledge of the law merchant. Nor were the common law jurors taken from the commonalty of merchants. It became necessary, therefore, in a case involving the law merchant, to prove what the rule of that law applicable to the case was, unless, indeed, the rule were one of such common application, that the judge would take judicial cognizance of it. In other words, the law merchant "was proved as foreign law now is. It was a question of fact. Merchants spoke to the existence of their customs as foreign lawyers speak to the existence of laws abroad. When so proved, a custom was part of the law of the land."[1] This condition of things existed for about a century and a half — from the appointment of Coke as Lord Chief Justice in 1606 to the accession of Lord Mansfield in 1756.[2]

The Law Merchant a Body of Trade Customs

During this second period in the development of the law merchant, the term loses much of the definiteness which characterized it during the first period. It is not employed to designate a well-known body of legal rules which are admin-

to hear "from day to day and hour to hour, from time to time all Occasions plaints and pleas of a Court of Pypowders together with summons, attachments, arrests, issues, fines, redemptions and commodyties and other rights whatsoever to the same Courts of Pypowder any way appertaining." In 1773, these provisions were extended to new counties and to additional fairs and markets authorized in newly settled parts of the colony. The Colonial Laws of New York, Vol. 1, p. 296; Vol. 5, p. 589.

[1] Macdonell's Introduction to Smith's Mercantile Law. 2d ed., lxxxiii.

[2] *Ibid.* Scrutton, Elements of Mercantile Law, Chap. I.

istered in certain courts, but rather those trade usages whose existence had been established to the satisfaction of the regular tribunals, and which those tribunals were willing to enforce in cases growing out of mercantile disputes. Of this period Mr. Scrutton says:[1] "And as the Law Merchant was considered as custom, it was the habit to leave the custom and the facts to the jury without any directions in point of law, with a result that cases were rarely reported as laying down any particular rule, because it was almost impossible to separate the custom from the facts;[2] as a result little was done towards building up any system of Mercantile Law in England."

The Law Merchant as the Law of All Nations

Lord Mansfield was dissatisfied with this condition of the law and devoted his great abilities to its improvement. He was not an intense partisan of the common law like Coke, nor did he show Holt's hostility to the innovations of Lombard Street. On the other hand, he was a thorough student of the civil law, was familiar with the writings of foreign jurists and was in hearty sympathy with the desire of merchants and bankers for the judicial recognition of their customs and usages. We are told[3] that "he reared a body of special jurymen at Guildhall, who were generally retained in all commercial cases to be tried there. He was on terms of familiar intercourse with them, not only conversing freely with them, but inviting them to dine with him. From them he learned the usages of trade, and in return he took great pains in explaining to them the principles of jurisprudence by which they were to be guided."[4]

[1] Scrutton, Elements of Mercantile Law, Chap. I.

[2] An excellent illustration of this is afforded by the Bank of England *v.* Newman, Ld. Raymond, 442 (1699). Lord Holt told the jury that when a person sold a note payable to bearer, without indorsing it, he did not become liable to the buyer; but the jury found a verdict against the seller who had not indorsed the note.

[3] Campbell's "Lives of the Chief Justices." Vol. 2, 407, note.

[4] Not infrequently were the verdicts of these mercantile juries upset by Lord Mansfield. In Grant *v.* Vaughan, 3 Burr, 1516 (1764) the Chief Justice left to a special jury the question whether a check payable to bearer was "in fact and practice negotiable." The jury found it was

He discovered that the usages and customs of merchants were in the main the same throughout Europe. When a mercantile case came before him, he sought to discover not only the mercantile usage which was involved, but the legal principle underlying it. It was this habit which called forth the oft-quoted eulogium of his disciple and colleague, Mr. Justice Buller: "The great study has been to find some certain general principle, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard those principles stated reasoned upon, enlarged, and explained till we have been lost in admiration of the strength and stretch of the human understanding."

Lord Mansfield's methods are admirably illustrated, as Mr. Scrutton has pointed out, in the leading case of Luke *v.* Lyde.[1] The question at issue was, what freight must be paid by a shipper, in case of loss. Lord Mansfield felt quite certain, at the trial, of the proper answer to be given, but "he was desirous to have a case made of it, in order to settle the point more deliberately, solemnly and notoriously; as it was of so extensive a nature; and especially, as the maritime law is not the law of a particular country, but the general law of nations: '*non erit alia Romæ, alia Athenis; alia nunc, alia posthac: sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.*'" After thus stating his reasons for reserving the case for the formal opinion of the court, he proceeds to lay down the legal principles which must rule the case. The chief sources of these principles are the Rhodian laws, the *consolato del Mare*, the laws of Oleron and Wisby, the Ordinances of Louis XIV. and various treatises on the law merchant, and the usages and customs of the sea. It was from such sources, and from the current usages of merchants, that he undertook to develop a body of legal rules, which should be free from the technicalities of the com-

not. Whereupon, Lord Mansfield and his colleagues Justices Wilmot and Yates set aside the verdict. The Chief Justice said he thought he was leaving to the jury "a plain fact upon which they could have no doubt," but upon further consideration, he had reached the conclusion that he ought not to have left the question to them, "for it is a question of law whether a bill or note is negotiable or not, and it appears in the books that these notes (checks to bearer) are by law negotiable."

[1] 2 Burrows 882. (1759.)

mon law, and whose principles should be so broad and sound and just, as to commend themselves to all courts in all countries. This conception of the law merchant, as a branch of the *jus gentium*, was not original with Lord Mansfield. It had found frequent expression, in former centuries, as the extracts which we have given above clearly disclose. The important fact is that the chief justice of the King's Bench — the official head of the common law bench and bar — should devote his great energies to the development of a body of legal rules which should rest not on common law principles, but upon the principles "which commercial convenience, public policy and the customs and usages of" merchants had "contributed to establish, with slight local differences, over all Europe."[1] It is this cosmopolitan character of the law merchant, to which Lord Blackburn referred in the following passage, taken from one of his great opinions: "There are in some cases, differences and peculiarities which by the municipal law of each country are grafted on it, but the general rules of the law merchant are the same in all countries. . . . We constantly in English courts, upon the question what is the general law, cite Pothier, and we cite Scotch cases when they happen to be in point; and so in a Scotch case you would cite English decisions and cite Pothier or any foreign jurist, provided they bore upon the point."[2]

The Law Merchant of To-Day

Lord Mansfield's habit, of applying the principles of the law merchant to the decision of cases, brought in the common law courts, has been followed for a century and a half by English and American judges. The result has been an extensive amalgamation of the rules of the law merchant with those of the common law. These two bodies of rules no longer stand apart, as they did three centuries ago. Each has been modified by the other and, to a great extent, has lost its separate identity. And yet it is not difficult to point out rule after rule, which has come into English jurisprudence

[1] Judge Story in 2 Gallison (U. S. Circuit Court) 398, 472 (1815).
[2] McLean *v.* Clydesdale Bank, 9 App. Cases, pp. 95, 105 (1883).

from the law merchant, and which retains the characteristic features which it possessed, when, centuries ago, it was unknown to common law tribunals and was enforced only in merchants' courts — the courts pepoudrous, the staple courts and the like — or in the court of chancery.

Let us consider very briefly three of these. The first two are stated by Sir John Davies, in his work On Impositions, from which we have made several quotations. After declaring that the law merchant and the laws of the sea "admit of divers things not agreeable to the common law of the realm," he gives these instances: "First, If two merchants be joint owners, or partners of merchandizes, which they have acquired by a joint contract, the one shall have an action of account against the other, *Secundum Legem Mercatoriam*, but by the rule of the common law, if two men be jointly seized of other goods, the one shall not call the other to account for the same." [1] The distinction between the rights and powers of partners over firm property on the one hand, and the rights and powers of tenants in common on the other, is still due to the fact, that the former have their origin in the ancient law merchant, the latter in the equally ancient common law.[2] "Second, If two merchants have a joint interest in merchandizes, if one die, the survivor shall not have all, but the executor of the party deceased, shall by the Law-merchant call the survivor to an account for the moiety, whereas by the rule of the common law, if there be two joint tenants of other goods, the survivor *per jus accrescendi* shall have all." This doctrine of non-survivorship among partners has been referred to, at times, as resting on a rule of equity,[3] but there is abundant proof of its origin in the law-merchant. In a note to a case decided by the Common Pleas in the year 1611, it is said: "It was agreed by all the justices that by the Law of Merchants, if two Merchants join in trade, that of the increase of that, if one die, the others shall not have the benefit by survivour." [4] A similar statement was made by

[1] Quoted in Zouch's "Jurisdiction of Admiralty," 128.

[2] That this distinction is one of practical importance to-day is shown by Preston *v.* Fitch, 137 N. Y. 41; 33 N. E. 77 (1893).

[3] Lord Thurlow in Lyster *v.* Dolland 1 Ves. Jr. at p. 434 (1792).

[4] Hammond *v.* Jethro, 2 Brownlow 99, note.

Lord Keeper North, in a chancery case decided in 1683: "The custom of merchants is extended to all traders to exclude survivorship."[1] If any doubt remains as to the origin of this doctrine it ought to be dispelled by the following extract from the Laws of Oleron: "If two vessels go a fishing in partnership, as of mackerels, herrings or the like, and do set their nets, and lay their lines for that purpose, . . . and, if it happen, that one of the said vessels perish with her fishing instruments, and the other escaping, arrive in safety, the surviving relations or heirs of those that perished, may require of the other to have their part of the gain, and likewise of their fish and fishing instruments, upon the oaths of those that are escaped."[2]

The third rule, to which we would refer, is that relating to the right of stoppage *in transitu*. How much doubt formerly surrounded the origin of this rule, is apparent from the following language of Lord Abinger, Chief Baron of the Exchequer: "In courts of equity it has been a received opinion that it was founded on some principle of common law. In courts of law it is just as much the practice to call it a principle of equity, which the common law has adopted."[3] The learned judge then traces the course of judicial decision upon this topic, and reaches the conclusion that the earliest reported cases were based neither on principles of equity nor of common law, but on the usages of merchants. This conclusion has been approved by Lord Blackburn,[4] and by Lord Justices Brett and Bowen. "The doctrine as to stoppage *in transitu*," said Lord Justice Brett, "is not founded on any contract between the parties; it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop *in transitu* was originally proved in evidence as a part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in equity."[5] In the same case, Lord Justice Bowen

[1] Jeffreys *v.* Small, 1 Vern. 217.
[2] Laws of Oleron, by Guy Meige, chap. xxvii. This appears as chap. xxv of the Laws of Oleron, as they are printed in the Appendix to Godolphin's View of Admiralty Jurisdiction. 1661.
[3] Gibson *v.* Carruthers. 8 M. & W. 321, 338 (1841).
[4] Blackburn on Sales (2d ed.) 317, *et seq.*
[5] Kendal *v.* Marshal, 11 Q. B. D. 356, 364.

expressed himself as follows: "The right of stoppage *in transitu* is founded upon mercantile rules, and is borrowed from the custom of merchants; from that custom it has been engrafted upon the law of England. . . . This doctrine was adopted by the Court of Chancery, and afterwards adopted by the Courts of Common Law." [1]

The Law Merchant and the Court of Chancery

It is not strange that the doctrine of stoppage *in transitu* and the doctrine of non-survivorship among partners make their first appearance, as far as reported cases are concerned, in the Court of Chancery. We have seen that Malynes, writing early in the Seventeenth Century, declared that "merchants' causes are properly to be determined in the chancery . . . for the customs of merchants are preserved chiefly by the said Court." [2] While the various forms of merchants' courts were in active operation, merchants rarely needed to resort to the regular tribunals of the realm. But as those courts died out, during the latter part of the sixteenth and the early part of the seventeenth century, mercantile disputes had to be brought either in the common law courts or the court of chancery. After Lord Bacon's victory over Lord Coke, the jurisdiction of chancery became very extensive, and merchants were able to bring many of their disputes before that tribunal for adjudication. All the traditions of this court favored the recognition of the law merchant. As early as 1473 the chancellor had declared that alien merchants could come before him for relief, and there have their suits determined "by the law of nature in chancery . . . which is called by some the law merchant, which is the law universal of the world." [3]

Naturally, therefore, many of the rules of the law merchant have come into English jurisprudence through the Court of Chancery. Not a few of them are looked upon as the creatures of equity, when in fact they are the offspring of the law merchant, which chancery has deliberately adopted.

[1] *Ibid.* at p. 368.
[2] Lex Mercatoria, p. 303.
[3] Cited in Blackburn on Sales (2d ed.) 318.

50. THE EARLY HISTORY OF NEGOTIABLE INSTRUMENTS [1]

By Edward Jenks [2]

THERE is, upon some subjects, a touching absence of curiosity among English lawyers. Institutions which are the very heart of modern business life, the fountain-heads of not ungrateful streams of litigation, are accepted as though, like the image of Ephesus, they fell direct from heaven for the benefit of a deserving profession. The legal questions to which they give rise are studied with minute care, the legal relationships which they create are made the occasion of microscopic analysis. But the subject itself, the really interesting and important matter, is left untouched.

No example better than negotiable paper. Bills of Exchange, with their kindred documents, have rendered international commerce possible. They are familiar to the business man, the lawyer, the impecunious — a category somewhat comprehensive. They have been the occasion of scores of statutes and thousands of reported decisions. Without them modern life would be impossible or unrecognizable. Yet it is hardly going too far to say that, in England, we have as yet no serious attempt to trace the origin of negotiable instruments. Some of the writers who profess to deal with the law of Bills of Exchange make no allusion whatever to it. Others devote a page or two of discursive remarks to the historical side of the subject, [3] as a sort of concession to de-

[1] This Essay was first printed in the Law Quarterly Review, 1893, vol. IX, pp. 70-85.

[2] A biographical note of this author is prefixed to Essay No. 2 in Volume I of this Collection.

[3] Cf. Byles, preface to 1st edition; Chitty, Bills of Exchange, 11th edition, pp. 1-3; Jencken, Compendium, &c., Introduction.

cency; and occasionally a learned judge drops a remark in the same direction.[1] But the net result of these efforts cannot be said to be gratifying. We are favoured with the stock quotations from Cicero and the Pandects (which it is agreed have nothing to do with the matter), with the *dicta* of Pothier and Heineccius.[2] We are told that the first statutory reference to the subject in England is of the year 1379,[3] and the first reported decision of 1601.[4] For the earliest English treatise we are referred to Malynes, and in the same breath told that Malynes was probably wrong in his most elementary statements.[5]

Naturally enough, the Germans have not contented themselves with this empirical method. While their study of the *Dogmatik* of the subject is perpetually bringing out new points of interest, while they watch keenly the abundant legislation, not only of the Continent but also of England, in the hope of establishing something like a logical theory of negotiable instruments, they are equally alive to the historical aspects of the matter. Ever since the establishment of the *Zeitschrift für das gesammte Handelsrecht* in the year 1858, the writers in that review have been adding to our knowledge of the early history of the Law of Exchange (*Wechselrecht*), though it must be admitted that anything like unanimity, even upon important points, has not yet been attained. The articles in the *Zeitschrift für Handelsrecht* are then rather stores of material for the careful elaboration of hypotheses, than authoritative expositions of truth. The same admission must also be made with regard to the more permanent works of Martens,[6] Biener,[7] Endemann,[8] and other writers who have attempted to account for the introduction

[1] E. g. the late Sir Alexander Cockburn, in *Goodwin* v. *Robarts*, L. R. 10 Exch. pp. 347 et seq.

[2] Chitty, p. 2; Jencken, p. 1.

[3] In the 3 Ric. II, c. 3 (Chitty, p. 2).

[4] *Martin* v. *Boure*, Cro. Jac. 6 (ib.).

[5] L. R. 10 Exch. p. 347.

[6] Versuch einer historischen Entwickelung des wahren Ursprungs des Wechselrechts. (Göttingen, 1797.)

[7] Wechselrechtliche Abhandlungen. (Leipzig, 1859.)

[8] Studien in der Romanisch-kanonistischen Wirthschaft- und Rechtslehre. (Berlin, 1874.) [The valuable results of Goldschmidt, in his Handbuch des Handelsrechts, Pt. I, Universalgeschichte, 3d ed., 1891, should be compared. — Eds.]

of negotiable instruments. Subject, however, to this important reservation, it may be possible to put together a few facts of interest to English readers.

The existence of bills of exchange in something like their present form was unquestionably known to the merchants of the fourteenth century. A Piacenza Ordinance of the year 1391 [1] compels *campsores* to give written acknowledgments of moneys deposited with them, and provides for a special and speedy remedy on such documents. Unfortunately, nothing is said about transferability. But an almost contemporary Ordinance by the magistrates of Barcelona, dated 18th of March, 1394,[2] leaves the matter beyond doubt. The Ordinance is concerned with the weights to be used by the silk merchants, and with the form of the acceptance of letters of exchange (*y sobre la forma de la aceptacion de las letras de cambio*). It is expressly provided that any one to whom a letter of exchange is presented must answer within twenty-four hours whether he will accept (*complira*) or no, and must further indorse on the letter the decision to which he comes, together with the exact date of the presentation. If he fails to comply with this rule, he is to be deemed to have *accepted* (*que lo dit cambi li vage per atorgat*).

Half a century later, an Ordinance of the French King Louis XI,[3] creating or renewing[4] a quarterly fair in the town of Lyons, refers to the use of *lectres de change* as an established institution for merchants whose business compels them to frequent fairs. The whole Ordinance gives us a curious glimpse into the political economy of the Middle Ages. During the fair-days foreign moneys may be used, the fiscal regulations as to the export of coin and precious metals are suspended, the trade of money-changer may be exercised by persons of all nations, except *noz ennemis anciens*, the English. But it is more for our present purpose to know that, during the fairs, money may be remitted in all

[1] Printed in Martens, App. p. 18.
[2] Martens, App. p. 107.
[3] Recueil Général des anciennes Lois françaises, by Isambert, Jourdan, and De Crusy (ed. 1825), x. 451-6. The Ordinance is dated 1462.
[4] There appears to have been an earlier charter by Charles VII, in 1443, but this is not printed (cf. vol. ix. p. 119).

directions by *lectres de change*, so long as it does not find its way either to Rome or England, and that a special court is to sit for summary process against defaulters on such letters, *en faisant aucune protestation, ainsi qu'ont accoustumé faire marchands frequentans foires.* Unfortunately, the precise nature of this summary process is described neither here nor in the Piacenza Ordinance, though the latter states that it is to be *sine aliquâ petitione seu libello.*

The work of Pegoletti of Florence, *Practica della Mercatura*, attributed by Martens [1] to the commencement of the fourteenth century, contains unmistakable references to *scritti di cambio*, and indeed makes use of several of the technical terms so familiar at the present day. Further back than the fourteenth century, however, it does not seem possible to trace the existence of negotiable instruments in their modern form; in fact there is some slight negative evidence against their existence prior to the middle of the thirteenth century. Salvetti, the author of the *Antiquitates Florentinae*, mentions a *Corpus Artis Cambii Sanctionum* of the year 1259, which dealt largely with the art of weighing and testing coin, but did not recognise the existence of *literas cambii. Ex iis* TANDEM (says Salvetti) *eruitur Florentinorum fuisse literarum cambii utilissimum inventum.* [2]

Our enquiry into the earlier history of negotiable paper will, therefore, be of a purely biological character. We shall have to trace in the clauses of early medieval documents the germs from which the limbs of the negotiable instrument, so startlingly different from the orthodox forms of legal anatomy, were developed. For we may be quite sure that negotiable instruments were not an invention, but a development.

But before turning to this biological enquiry, let us satisfy ourselves that the legislators and writers of the fourteenth and early fifteenth centuries were dealing with facts, not with fictions. Hitherto we have only had references to imaginary instruments. We want to see concrete examples.

The oldest known to me is a bill of exchange of the 5th

[1] App. p. 2, where Pegoletti's 45th chapter is reprinted.
[2] Salvetti, Antiquitates Florentinae (1777), § 93, p. 62.

October, 1339. It is drawn by Barna of Lucca on Bartalo Casini and company of Pisa, payable to Landuccio Busdraghi and company of Lucca in favour of Tancredi Bonaguinta and company. It reads thus: —

Al nome di Dio amen. Bartalo e compagni: Barna da Lucha e compagni salute. Di Vignone. Pagherete per questa lettera a di xx *di novembre* 339 *a Landuccio Busdraghi e compagni da Luca fiorini trecento dodici e tre quarti d' oro per cambio di fiorini trecento d' oro, che questo di della fatta n'avemo da Tancredi Bonaguinta e compagni, a raxione di IIII e quarto per C alloro vantaggio, e ponete a nostro conto e ragione. Fatta di V d' ottobre* 339. — *Francesco Falconetti ci a mandate a paghare per voi a gli Acciaiuoli scudi CCXXX d' oro.*

The letter is addressed — *Bartalo Casini e compagni in Pisa.* It bears also a trade-mark, near to which is the word *Prima.*[1]

Another example, though sixty years younger, is of interest for our purpose, for it is contained in a reference sent by the magistrates of Bruges to the magistrates of *Barcelona*, whose exchange-ordinance we have already noticed. Inasmuch as there was no political connection between Barcelona and Bruges at the beginning of the fifteenth century, the reference must have been occasioned by one of two facts — the residence of the drawee at Barcelona, or some special reputation possessed by the Catalonian city in exchange matters. In either case the fact is interesting. Of course the practice of 'stating a case' for the opinion of a specialist or learned body was extremely familiar to the courts of the later Middle Ages; Henry VIII's divorce question affording a conspicuous example. Here, however, is the document: —

Al nome di Dio amen. A di 18 *Maggiore*, 1404. *Pagate per questa prima di cambio ad usanza à Piero Gilberto et à Pièro di Scorpo scuti mille de Felippo à soldi* 10 *Barcelonesi per scuto, i quali scuti mille sono per cambio, che* (. . .) *con Giovanni Colombo à grossi* 22 *di* 9. *scuto; et pagate à*

[1] Printed by Brunner, Zeitschrift für Handelsrecht, xxii. 8. Martens (p. 65) speaks of an example of the year 1325, quoted by Baldus de Ubaldis.

nostro conto et Christo vi guardi. — Antonio Quarti Sal. de Bruggias.

The letter is addressed — *Francisco de Prato et Comp. à Barsalona.*[1]

Here then we have two bills or letters of exchange, one upwards of 500 years old, the other only half a century younger, which would (unquestionably) be perfectly intelligible to any English merchant at the present day. Three points of difference may, however, be briefly noted.

1. Each bill has *four* parties, instead of, according to modern practice, three. In addition to the drawer, drawee, and payee, there is a presenter, or recipient on behalf of the payee. We shall see that this is the common practice, and we may be able to offer a suggestion as to its meaning.

2. The name of the drawee is *indorsed*. In the first bill it appears also on the face, in the second it does not. This fact will come in usefully hereafter.

3. The second bill is written in Italian, though none of the parties to it have (apparently) an Italian domicile, nor does there seem to be any essential reason for the choice of language. This fact seems to point to an early Italian influence in bills of exchange.

Can we now go a step further, and vivify our notions of early negotiable instruments by observing them as subjects of actual litigation? Fortunately we can; and the glimpse will not be without interest, as it can only be obtained through the medium of fragmentary publications.

On the establishment of the Belgian kingdom in 1837, the new Government, in the ardour of patriotism, undertook the issue of a *Récueil des anciennes Coutumes de la Belgique*. Two of the most important publications of the Royal Commission are the *Coutumes d'Anvers*[2] and *de Bruges* respectively. But it pleased the wisdom of the Government to forbid the publication in the latter compilation of 'le texte des sentences ou décisions particulières et les matiêres commerciales.' Whereby, certain most interesting matter would have

[1] Zeitschrift für Handelsrecht, xxii. 7.

[2] As to the dates of the various codes comprised in this compilation, cf. an interesting note by Brunner, Zeitschrift für Handelsrecht, xxii. 4, n. 5. They are much later than the Bruges decisions.

been lost to students of this generation, had not the distinguished German jurist Brunner appealed in the name of learning to the editor of the *Coutumes de Bruges*, Dr. Gilliodts van Severen, to save at least some fragments from the general fate. Dr. Van Severen, in reply, forwarded to Professor Brunner several manuscript copies of protocols recorded in connection with proceedings before the Town Council, or *Schöffengericht*,[1] of Bruges, in the middle of the fifteenth century. These reports, long extracts from which have been published by Brunner in the *Zeitschrift für Handelsrecht*, are thus almost contemporaneous with the Lyons charter of Louis XI, and with the important Bolognese Ordinance of 1454,[2] to be hereafter alluded to. The cases quoted by Brunner are interesting in all kinds of ways, but space forbids the quotation of more than one example.

Spinula v. *Camby*. Judgment of 29th March, 1448. Bernard and Matthias Ricy, at Avignon, on the 3rd June, 1439, gave a letter of exchange (*fist ung change*) to Cerruche, of Bardiz, for 450 florins. The bill was drawn on one Marian Rau, and was payable at Bruges to Bernard Camby (the defendant) and another. Marian Rau paid the defendant in full soon after the arrival of the bill at Bruges, but the defendant nevertheless 'protested' it for non-payment, and sent it back with the protest to Avignon. Thereupon the Ricys were compelled to pay the amount (presumably to Cerruche). Marian's rights in the matter seem to have passed, in some unexplained way, to her brother Odo, who transferred them by a formal instrument (produced before the Court) to the plaintiff, Spinula. The latter brought his action against Camby to recover the amount paid him by Marian.

The defendant pleaded, first, that before the assignment to the plaintiff, Odo Rau had become bankrupt (*estoit faillj*), and that his goods and debts, therefore, belonged to his creditors rateably; second, that he had never had any dealings with Odo Rau, but that if the plaintiff would bring his action

[1] It is well known that, in the Middle Ages, the town-corporations frequently acquired or absorbed the jurisdiction formerly belonging to the local *Schöffen* or *scabini*.

[2] Printed in Martens, App. pp. 56-63.

in the name of Marian, he would account as a good merchant should.

The court deputed certain of its members to consider the matter, and also took the advice of two merchants, one from Lucca, the other from Pisa, whom the parties had chosen as arbitrators. In its judgment it nonsuited the plaintiff, on the express ground that the attempted transfer to him of the rights of the Raus was worthless.[1]

The case is startlingly modern in some of its aspects. We have the modern bill of exchange, with presentation and payment. Evidently also the 'protest' was a fully recognised proceeding, for on its arrival at Avignon the Ricys acted upon it without any suspicion of the trick which had been played.[2] And the recourse of the payee against the drawer, familiar also to modern law, is clearly admitted. The medieval aspects of the case are, of course, the refusal to recognise a written transfer of a *chose in action*, or, as the report puts it, *droit et action*, the existence (as in the earlier examples) of the four parties to the bill, and the reference to the Italian merchants.

Enough then has been said to prove the existence and legal recognition of bills or letters of exchange at the beginning of the fifteenth century. Minor points can be dealt with afterwards. We must now make an attempt to trace the biological development of the negotiable instrument.

It will hardly be disputed that the negotiable instrument of to-day still retains one of the most marked features of early law. It is one of the very few surviving instances of the *formal* contract. In spite of all modern legislation, in spite of the *Zeitgeist* and its dislike of formalism, it is still extremely dangerous to depart from the letter of precedent in negotiable paper. A glance at the examples of the fourteenth and fifteenth centuries is sufficient to show how slight are the changes in the form of a bill of exchange which the revolution of five centuries has produced.

[1] Printed in Zeitschrift für Handelsrecht, xxii. 22-24.

[2] According to the Bolognese Ordinance of 1454, the protest had to be made before a *judex* (Martens, App. p. 61). Had this precaution been adopted in the case quoted, in all probability the fraud would have been discovered.

But if in this one respect the negotiable instrument smacks of antiquity, in its more essential qualities it is wholly opposed to the spirit of early law. The alienability of rights *in personam* (to say nothing of proprietary rights) by simple endorsement or handing over of a document of title, the improvement of title by transfer, are very modern notions. It will be sufficient if we follow up the track suggested by the first of these qualities.

Choses in action are inalienable in early law for two reasons. In the first place the tribunals do not allow *representation;* or, in other words, the transferee is unable to enforce his claim because he is regarded by the court as a stranger to the proceedings. In the second, a *chose in action* does not permit of that corporeal and formal transfer which is essential to the legality of early conveyances. These two considerations give us the key to the history of negotiable instruments.

Primitive tribunals do not admit of representation. This is a rule with which every student of law is familiar. We need here only point out the extreme tenacity with which German Law held to the maxim.[1] Even so late as the twelfth century, the clumsy Roman method of *adstipulatio*[2] was used by the contracting party who wished to provide for the enforcement of his rights by a third person.

But there arrives a period in the history of every progressive people when this rule becomes a grievous nuisance, and all kinds of evasions are then attempted. According to the great authority of Brunner, modern Europe is indebted for the earliest successful efforts of this character neither to what we now call Germany,[3] nor to France,[4] but to the genius of the Lombard jurists, whose ideas, Teutonic in the main, differed in many important respects from those of the Transalpine Germans. Whether these differences, especially

[1] Schröder, Lehrbuch der deutschen Rechtsgeschichte, p. 709. [Compare Brunner's essay on The Early History of the Attorney in English Law, translated in the Illinois Law Review, 1908, III, 257. — Eds.]

[2] Cf. Loersch and Schröder, Urkunden zur Geschichte des deutschen Rechtes, Nos. 5, 25, 56, 60, 63, 68, 74, 81, 105.

[3] Zeitschrift, xxii. p. 103.

[4] Das französische Inhaberpapier, p. 30 and *passim;* [now reprinted in his Forschungen zur Geschichte des deutschen und französischen Rechts, 1894. — Eds.]

conspicuous in legal matters, were due to the geographical connection of the Lombards with the native soil of Roman Law, or to some race-peculiarity of the Lombard stock, is too great a question to be mooted here. Only it is of importance for English students never to forget the close affinity between the Anglo-Saxon and the Lombard, an affinity which shews itself in politics [1] and law [2] as well as in speech.

It is not, of course, to be expected that the earliest steps of a reform such as we are seeking should be found in legislation. Primitive legislators do not trouble themselves much about commercial convenience; they are even apt to look upon the rapid circulation of capital with grave suspicion. The art of the conveyancer, in which the Lombards were specially distinguished, is the origin of the reform.

Two great collections of early Lombard documents have recently been rendered accessible to the ordinary student. The first of these is the *Memorie e Documenti per servire all' istoria del Ducato de Lucca*, the fifth volume of which contains a reprint of the cathedral documents of the 7th, 8th, 9th, and 10th centuries. During this period Lucca formed part of the princedom or duchy of Tuscany, itself a part of the Lombard Kingdom of Italy. Towards the close of the eighth century it became, of course, subject to the overlordship of the Frank empire; but the respect with which the conquerors treated Lombard institutions is well known.

The second collection is the recently edited *Codex Cavensis*, the reprint of the original deeds contained in the archives of the Cluniac monastery at La Cava, near Salerno, founded by Alferius Pappacarbone in the year 1011.[3] Salerno, which had previously formed part of the Lombard principality of Beneventum, became in the year 843 (the year of the Treaty of Verdun), with the approval of its Frankish overlord, Ludwig the German, a separate duchy, and so remained until its conquest by Roger Guiscard in 1077. The only fact which

[1] See this idea worked out by Sohm, Fränkische Reichs- und Gerichts-Verfassung. p. 24-26.

[2] E. g. in questions of *Dower* and the *Traditio per cartulam.*

[3] Codex Cavensis, synopsis, p. ix. (It will interest British readers to know that to the expense of the edition there contributed, amongst others, the 'Praesidens rebus Regni Britannici' and the 'Academia cui titulus Innertemple.')

makes against the character of the Codex as an exposition of pure Lombard practice, is the admittedly successful inroads of the Saracens into Southern Italy during the pre-Carolingian period. But it is unlikely that the Lombard lawyers would be seriously affected by Saracenic influence. Of course the bulk of the documents in both collections come long before the revival of the study of Roman Law in Italy.

Brunner arranges under four heads those clauses of the Lombard documents which aim at evading the strictness of the early law of transfer. But, as it is always an advantage to simplify classification where possible, we may be allowed to absorb his four classes into two, basing our arrangement rather on the nature of the object aimed at, than on the form of words by which that object is attained. Let it be understood that our examples are taken from all kinds of documents — gifts, sales, leases, bonds, and even wills.

Class I. Here the object of the conveyances is to provide specially for the enforcement of a *right in personam*, on behalf indeed of the grantee, but *through the agency* of a third person. This attempt gives rise to the two forms which Brunner has named (*a*) *Exactionsklausel*, and (*b*) *Stellvertretungsklausel*. The former runs thus: — *per se aut per illum hominem cui ipse hanc cartulam dederit ad exigendum*. It is found so far back as the year 771, in a curious document in which a monk makes over to a church (amongst other things) the right to avenge his death if he shall be murdered — i. e. (doubtless) the right to recover his wergild.[1] A Lucchese document of the year 819 has a significant variation — *aut ad illum homine(m) cui tu hanc pagina(m) pro animâ tuâ ad exigendum* ET DISPENSANDUM *dederis*.[2] The *et dispensandum*, which appears again in a will of the year 836,[3] refers to the *dispensator*, or clerical official who disposed of the deceased's goods for the benefit of his soul. He forms an important link in the history of testamentary capacity. The *Stellvertretungsklausel* differs from the *Exactionsklausel* only in form. It runs — *vel cui istum breve in manu paruerit in*

[1] Loersch and Schröder, No. 32.
[2] Memorie di Lucca, No. 424.
[3] Ib. No. 532.

vice nostra, and is to be found in numerous examples of the La Cava documents, from the early ninth century onwards.[1] The important point to notice about both these variations is that they treat the transferee as the *agent* of the original grantee, not as an independent acquirer.

Class II. Here we come upon a different plan, which evidently contemplates an actual transfer of the beneficial right. This group of clauses is named by Brunner the *Inhaberklauseln*, and is subdivided by him into *alternative* and *pure*. His meaning will be apparent in a moment if we take an example of each subdivision. The *alternative Inhaberklausel* reads thus — *tibi aut eidem homini qui hunc scriptum pro manibus abuerit*,[2] or, *mihi seu ad hominem illum, apud quem brebem iste in manu paruerit*.[3] It is found in the middle of the ninth century. The *reine Inhaberklausel* is not quite so old. The earliest example quoted by Brunner is under the year 962. It runs thus — (ad componendum) *ad hominem aput quem iste scribtus paruerit*,[4] and it is noteworthy that the earliest examples are nearly all concerned with wills, or at least mortuary gifts.[5] The transition from the alternative to the pure *Inhaberklausel* simply consists in omitting the name of the original *stipulator*, and the step is easily explained by the hypothesis that the latter form was first used in cases which, in the nature of things, the *stipulator* could not expect to enforce his own claim.

The first class of clauses, which we may call, for brevity's sake, the 'representative' clauses, seem rarely to have been found north of the Alps. The Bolognese Ordinance of 1454 shows distinct traces of their influence in Italy when it says: — *Et quod liceat cuicunque, cuius intersit, per se, vel alium legitime intervenientem dictas Scripturas Librorum* (deposit receipts) *petere* EXECUTIONI MANDARI *contra Scribentem*.[6] And in the Stralsunder Stadtbuch for the years 1287-8 we get this interesting entry: — *Ludekinus de Fonte dabit in*

[1] Cf. Codex Cavensis, vol. i. No. 11; vol. ii. Nos. 11, 221, 225, 242.
[2] Memorie di Lucca, v. 2, No. 825.
[3] Codex Cavensis, ii. No. 213.
[4] Codex Cavensis, ii. No. 218.
[5] See the examples quoted in the Zeitschrift, xxii. 505-510.
[6] Ordinance, xliii. § 3 (Martens, App. p. 57).

festo beati Michaelis vel Gerardo dicto Repere UEL SUO NUNTIO CUICUNQUE, *dummodo apportaverit literam creditivam* 10 *mrc.*[1] But, with the greatest possible deference, it can hardly be said that the German phrase — *wer diesen Brief mit ihrem Willen inne hat* — conveys the full force of its alleged Latin equivalent — *cui ipse hanc cartulam dederit ad exigendum.* And of his alleged *Stellvertretungsklausel* — *oder wer diesen Brief von ihretwegen inne hat*[2] — Brunner quotes no example, though the Stralsund entry may perhaps be said to give us a German instance of the *Stellvertretungsklausel.*

Moreover, of the *pure* Inhaberklausel, which seems to possess no special advantage over the alternative form, there appear to be but few early examples either in France[3] or Germany.[4] The alternative Inhaberklausel, on the other hand, had established itself firmly in western and central Europe by the end of the thirteenth century. Sometimes it is in a Latin form — *quos dabunt praedicto Radolfo vel alicui de concivibus nostris qui presentem literam presentavit coram nobis.*[5] But it soon acquires a vernacular familiarity — *joft den ghenen die dese lettren bringhen sal,*[6] *oder behelder des briefs,*[7] *ou à celui qui cette lettre portera.*[8]

Perhaps the most curious point about the *Inhaber* clauses is that there seems to have been no necessity for the transferee of the claim to prove his title. We are, of course, familiar with the presumption of modern law in favour of the holder of negotiable instruments. But it is a little startling to find, so early as the eleventh century, the guardianship of a widow passing from hand to hand with a document. Yet in the year 1036 a certain 'comes Petrus' by his will left the guardianship of his wife, and all belonging thereto, to his *germani* Malfred and John or *illi viro cui*

[1] Fabricius, Das älteste Stralsunder Stadtbuch, p. 67, No. 526 (also printed in Loersch and Schröder, No. 152).
[2] Zeitschrift, xxiii. p. 228.
[3] Das französische Inhaberpapier, App. 29, 57.
[4] See the rare examples quoted by Gareis, Zeitschrift, xxi. p. 372 n.
[5] Loersch and Schröder, No. 159.
[6] Loersch and Schröder, No. 161 (13th cent.).
[7] Ib. No. 294 (15th cent.).
[8] Das französische Inhaberpapier, p. 50 (13th cent.).

scriptum in manu paruerit. Thirty years later, a certain clerk John appeared in court as guardian of the widow, and was accepted as such without a question on production of the document — *in cuius manu, ut supra scriptum est, praedictum scriptum paruit.*[1] With regard to debts, we have an actual decision *ad hoc* in the fifteenth century, by the council of the famous city of Lübeck, the head of the Hanseatic League, and, by virtue of its appellate jurisdiction, the greatest authority on commercial law in Germany.

'Herman Ziderdissen, burgher of Köln on the Rhine, appearing before the honourable Council at Lübeck, arrests Johan Cleitzen, burgher of the same, asserts and claims of him 100 Rhenish gulden, which the same Johan Cleitzen owed to Frank Greverôde, burgher of Köln, *his heirs or holder of the letter* (*sînen erven ofte hebbern des brêves*), and which the same John with his own hand, so he openly acknowledged and admitted, underwrote and with his signet sealed, which before the council at Lübeck was read, yet he refuses to pay the debt in arrear. Thereto Johan Cleitzen answers that Herman should shew his authority (*macht*) from Frank Greverôde. Thereupon the aforesaid Council at Lübeck decided that he has no right to it: As the letter contains the words "hebbere des brêves," and he admitted that he had underwritten it, so must he answer thereto; if he has any objection to make, let it be brought forward as right is.'[2]

Here then is a clear recognition of the transferability of a bond with the alternative *Inhaberklausel*, at the end of the fifteenth century. Later on we shall see that there came a reaction in France which was not without its results. The English practice of the period seems to have been to make the bond payable to the original creditor *vel suo certo attor-*

[1] De Blasius. Series Principum Salerni, App. p. iii, No. 1. Doubtless with the *representative* clauses the transferee had to show his authority (see the *literam creditivam* of the Stralsund entry). [An interesting controversy over the correctness of Brunner's theory in this respect, as relating to the Codex Cavensis material, has arisen between Brandileone and Schupfer, two distinguished Italian legal historians: Brandileone, Le così dette clausole al portatore nei documenti medievali italiani (in Rivista di diritto commerciale e marittimo, 1903, vol. I, No. 5); Schupfer, Il diritto privato dei popoli germanici con speciale riguardo all' Italia, 1907, vol. I, p. 214. — Eds.]

[2] Loersch and Schröder, No. 317.

nato,[1] and, to enforce this clause, Letters of Attorney, of which examples are given by Madox,[2] were doubtless necessary. But it is time that we turn to the other side of the difficulty.

All early systems of law require for the transfer of rights a formal investiture or corporeal handling in the presence of the assembled community. Long after this corporeal transfer has become a mere form, symbolized by such survivals as the turf, clod, twig, knife, staff, &c., it continues to exercise a practical influence on conveyancing law. To the conservative force with which medieval Germany held to the *Auflassung*, a ceremony at first very real and practical, afterwards merely formal, modern Germany probably owes her important *Grundbuch* system.

It is, therefore, of great interest to notice that, while the other Teutonic races retained their symbolic investiture at least until the eleventh century, the Lombards, and their kindred Anglo-Saxons, had adopted the simpler and more modern form of *traditio per cartam* at a much earlier date. The Anglo-Saxon conveyance by *boc* or *charter* is found as early as the ninth century.[3] In a Lombard document of the eighth century, to which we have previously referred, the donor of an advowson not merely transfers it by *traditio cartae*, but recites that he obtained his title in the same way.[4] Perhaps the clearest evidence of the distinction is to be found in the directions to conveyancers contained in the *Cartularium Langobardicum* of the eleventh century.[5] The imaginary pupil is directed to *tradere per hanc pergamenam cartam venditionis* (such and such land) *ad Johannem, quod dehinc in antea a presenti die proprietario nomine faciat ipse et sui*

[1] See Madox, Formulare Anglicanum, Nos. 641-645, 647-649, &c. There is a bond in 27 Hen. VIII. made payable to the king, his executors *or assigns*, but the exception in favour of the crown is well known.

[2] E. g. Nos. 107, 119.

[3] Earle, Land Charters, pp. 130, 139, 141, &c. These are grants by private owners. Royal and episcopal grants by *boc* occur much earlier, and there is a doubtful instance of a private grant in 692 (p. 13). The royal *consent*, however, seems to have been required even for private grants. For other early examples, cf. Birch, Cartularium Saxonicum, Nos. 30, 57, 81, &c.

[4] Loersch and Schröder, No. 32.

[5] Monumenta Germaniae, Leges, iv. p. 595. (Extracts given in Loersch and Schröder, pp. 69-70.)

heredes aut cui ipse dederint. The same practice is to hold in the case of a Roman. But if the conveying party be a Salian, a Ripuarian, a Frank, a Goth, or an Alamman, the charter is to be placed on the ground, and upon it laid the knife, notched stick, clod, twig, &c.[1] The purchaser then takes up the charter (*levat cartam*).

In some obscure way this peculiar difference appears to have connected itself with the early Lombard law of contract. Whatever may be the philosophical explanation of the appearance of the contract as a legal phenomenon, it is pretty certain that it represents historically a compromise between litigants, secured by oath, pledges, and (generally) hostages. The promisor is under no direct liability to the promisee; the latter must enforce his security either against the *wadia* or the *fidejussores.*[2] The course of the Lombard law seems to have been this. Being familiar with the *traditio per cartam* in conveyances, it allowed the bond or document to act as the *wadium* in contracts. Naturally the particulars of the transaction are transcribed into the document, but the early *cautio* is not (according to the English *dictum*) the contract itself, nor even evidence of the contract, but, literally, the *security* for the contract.[3] Two points illustrate this truth forcibly, and one of them is of direct interest for the history of negotiable instruments.

In the first place it will be observed that nearly all the early examples of *cautio* are *penal stipulations.* The *Cartularium Langobardicum* says expressly — *Et in omnium fine traditionis adde: et insuper mitte poenam stipulationis nomine que est,* &c.[4] But we need not rely on *dicta.* The collections of Lucca and Salerno are full of eighth and ninth century examples.[5] In fact we might almost lay it down that

[1] If the purchaser were an Alamman there was added the mysterious *wandilanc.*

[2] This is evident from the early example of the Edict of Rothar, caps. 359-366. (Mon. Germ. Leges, iv. 82.)

[3] The *carta* is sometimes expressly described as *firmitas* (Memorie di Lucca, v. 2, No. 14). [The position of the *carta* in conveyances is shown by the fact that it was not written on till after the *traditio.*]

[4] Loersch and Schröder, p. 69.

[5] Memorie di Lucca, v. 2, Nos. 18, 24, 26, 28, 30, 31, 33-37, 39, 44-46, &c. Codex Cavensis, Vol. i., Nos. 11, 13, 14, 15, 16, 20, 24, 26, &c. The penalty was usually *in duplum,* but a fixed sum was frequently named.

no transaction was completed at that time without a penal stipulation.

The other point to notice is the extreme care with which many early *cautiones* stipulate for the return of the document on payment. Of course this clause only occurs in actual bonds for the payment of money, not in conveyances containing merely penal stipulations. But as early as the time of the Angevin and Marculfian Formularies (seventh and early eighth centuries) we find the clause *et caucionem meam recipere faciam,*[1] or even, *cautionem absque ulla evacuario intercedente recipiamus.*[2] The *evacuaria* or *Todbrief* was a formal document cancelling a bond alleged by the person claiming on it to have been lost. There is an example so late as the fourteenth century,[3] and as it was issued by the Duke of Austria himself (though he was only concerned in the matter as protector of the Jew creditor) we may gather that great importance was attached to the procedure. But, historically speaking, the stress laid upon the production of the *cautio* is easily demonstrable, and quite natural. Several of the Lombard documents of the ninth century make the express condition — *et eam* (paginam) *nobis in judicio ostiderit,*[4] or, simply, *et eam mihi ostenderit.*[5] If the creditor could not produce the pledge, the presumption was that he had realized on it; and, as the debtor was under no personal obligation to pay him, he naturally declined to do so except in return for his *wadium.*

It is hardly going too far to say that this is at least a plausible explanation of the doctrine of *presentation.* The necessity for the production of a bond (the *profert* of English law) had become established before the appearance of bills of exchange. *Qui presentem literam* PRESENTAVERIT,[6] *joft den ghenen die dese lettren bringhen sal.*[7] Thus the existence of the fourth or presenting party, who appeared in our first

[1] Loersch and Schröder, No. 17.
[2] Ib. No. 18.
[3] Ib. No. 213. For earlier examples see Rozière, Recueil Général des Formules, I, Nos. 378-382.
[4] Memorie di Lucca, v. 2, No. 424.
[5] Ib. No. 285; v. 3, Nos. 1107, 1148.
[6] Loersch and Schröder, No. 159.
[7] Ib. No. 161.

examples,[1] is amply accounted for. The *praesenteerder* and the *meister van den brieff* continue as separate persons in the Netherlands till the beginning of the seventeenth century.[2]

We have seen already that, by the end of the fifteenth century, presentation of *Inhaberpapier* was held to be sufficient without further proof of title. This had, probably, always been the Lombard rule, but the northern Germans had long held to the necessity for a special *Willebrief*, or documentary transfer. There was indeed a theory that this document must have three seals, that of the transferor and those of two witnesses.[3] But the Lombard rule ultimately prevailed.

We have now arrived at the point at which biology passes into history. The mercantile world is familiar, in the middle of the thirteenth century, with bonds or acknowledgments of debts which, though given originally to *A*, can be enforced by *B*, upon his production of the original document, with or without document of transfer. In the middle of the fourteenth century the mercantile world is familiar with bills of exchange in the modern sense. How was the intermediate step taken?

Without professing any detailed knowledge of the transition process, it is possible for us to lay our hands on instruments which are clearly in the transition-stage. Let us read this document, dated 124⅞, from the archives of Marseilles: —

Ego W. de sancto Siro, civis Massilie, confiteor et recognosco vobis Guidaloto Guidi et Rainerio Rollandi, Senensibus, me habuisse et recepisse ex causa PERMUTACIONIS SEU CAMBII *a vobis* £216 13*s.* 4*d.*, *pisanorum in Pisis, renuncians,*[4] *&c.; pro quibus* £216 13*s.* 4*d.*, *dicte monete promicto vobis per stipulationem dare et solvere vobis vel Dono de Piloso vel Raimacho de Balchi consociis vestris* VEL CUI MANDAVERITIS 100*l.* *turonensium apud Parisius in medio mense aprilis et omnes depensas et dampna et gravamina quae pro dicto*

[1] Ante, p. 55.
[2] Coutumes d'Anvers, vol. iv. p. 32, art. 42 and 43.
[3] Loersch and Schröder, No. 275.
[4] I. e. probably *renuncians exceptionem pecuniae non numeratae vel aliam exceptionem de jure competentem.* (See Bolognese Ordinance, xliii. § 1, Martens, App. p. 56.)

debito petendo feceritis vel incurreritis ultra terminum supradictum credendo inde vobis et vestris vestro simplici verbo absque testibus et alia probatione; obligans, &c. Actum Massiliae JUXTA TABULAS CAMPSORUM. *Testes* (4). *Factum fuit inde* PUBLICUM INSTRUMENTUM.[1]

Thirty years later comes the following document from the archives of Köln: —

Walleramus dictus de Juliaco viris prudentibus et amicis suis carissimis, judicibus, scabinis, magistris civium et universis civibus Coloniensibus quicquid potest dilectionis et honoris. Significo vobis presentibus, quod ratum et gratum habeo, quod vos detis et assignetis centum marcas, quas michi solvere tenemini in festo beato Martini hiemalis nunc futuro, Friderico dicto Schechtere civi Coloniensi, et vos clamo per praesentes quitos et absolutos de solutione dictarum centum marcarum in dicto termine facienda. In cuius rei testimonium sigillum meum duxi praesentibus apponendum. Datum Colonie 6 kalendas Maii, anno Domini, 1279.[2]

Once more: —

Viris discretis dominis Hermanno et Thidemanno de Warendorp, consulibus Lubicensibus, Hinricus de Lon necnon Johannes Pape salutem in omni bono. Comparavimus et emimus de Henrico Longo, fratre Johannis Longi, 10 *libras grossorum. Promittimus sibi solvere pro quilibet librum* 9 *marcas et* 12 *denarios in* 14 *die* POST VISIONEM PRESENTIS. *Petimus ut dictam pecuniam solvatis nomine praedicti Hinrici Johanni fratri suo. Valete semper. Datum in cena domini. Petimus, ut hiis et aliis bene persolvatur.*[3]

This last example is of the year 1341, two years later than the first true Bill of Exchange quoted above.[4] The Marseilles document is by far the most valuable, as it shows us, almost beyond a doubt, the nature of the process which was going on. The purchasers of the bill do not wish merely to change their money from Pisan to French coin; they wish also to have it remitted to Paris. W. de St. Cyr is a professional *campsor* or dealer in money, possibly with the actual

[1] Quoted in Brunner, Das französische Inhaberpapier, p. 73.
[2] Loersch and Schröder, No. 147.
[3] Ib. No. 196.
[4] Ante, p. 55.

right of coinage. He receives from Guidi and his partners a sum of Pisan money, and gives them, as we should say, a bill on Paris payable to order. The bill is attested by witnesses and becomes a public document (*publicum instrumentum*). The whole transaction is in striking accordance with the Piacenza Ordinance of 1391,[1] which compels *campsores* to give a written acknowledgment to their depositors *confessing that they have received the money deposited with them*, and declaring that the acknowledgment, *as well as the entries in the books of the campsores*, shall be evidence in favour of the creditors, *sicut crederetur et fides daretur si dicta scriptura et dicti libri essent solemne* PUBLICUM INSTRUMENTUM. Nothing could, in fact, be more tempting, and nothing more dangerous, than to treat the Bill of Exchange as the counterpart of the old Roman literal contract.

Of the endless points which present themselves with regard to the law of negotiable instruments in the Middle Ages, only one can be touched upon here. We have seen that, by the end of the fifteenth century, the holder of a bond or bill, containing the *Inhaberklausel*, was not obliged to show his title. Against this rather advanced doctrine the French writers of the sixteenth century protested, with remarkable success.[2] Founding themselves on the maxim — *un simple transport ne saisit point* — and carefully cutting out the following words — *sans apprehension* — they succeeded in compelling the transferee of a bill of exchange to produce evidence of his title.[3] This reactionary step seems to have led, in the first place, to the introduction of bills drawn in blank (*promesses en blanc*), which were used for the concealment of usurious transactions,[4] and were on that account forbidden by various Parliamentary *arrêts* of the early seventeenth century. Then recourse seems to have been had to the old French form of order or *mandat — à son command, à son command certain*,[5] &c. — of which examples are found in the thirteenth century. Naturally this form required some evidence of title, but the

[1] Martens, App. p. 18.
[2] Das französische Inhaberpapier, p. 68.
[3] Ibid.
[4] Tit. vi. of the Ordinance of 1673 lays down specific rules on the subject of *Les Intérêts du change et du rechange*.
[5] Quoted in Das französische Inhaberpapier, p. 74.

practice of *indorsement* had fully established itself by the middle of the seventeenth century. The great *Ordonnance de Commerce* of 1673 [1] distinguishes carefully between (a) *endossement*, the mere signature of the payee, which only made the holder an agent, and (b) *ordre*, containing the date and the name of the purchaser (*qui a payé la valeur en argent, marchandise, ou autrement*), which made the indorsee full owner, *sans qu'il ait besoin de transport, ni de signification*. How the practice of indorsement was introduced it is difficult to prove; but it is easy to see that the persistent use of the terms *brief, lettre*, might keep alive the idea of the original form of the document, and thus a writing which was, in effect, an address to a new holder, would come naturally where the address of a letter usually came — i. e. on the back. We have seen already, that in the earliest examples of bills of exchange the name of the *drawee* was indorsed.

This paper merely attempts to put together a few incidents in the early history of the negotiable instrument. It does not pretend to ascertain its origin. Claims have been made, with much plausibility,[2] for a Jewish parentage; and Oriental evidence must certainly be examined with care before it is rejected. But such a task requires scholarship.

[1] Isambard et De Crusy, xix. p. 100.
[2] Auerbach, Jüdische Obligationenrecht, i. 283 and note.

51. PROMISSORY NOTES BEFORE AND AFTER LORD HOLT[1]

By William Cranch[2]

THE question of liability of a remote indorser of a promissory note, in Virginia, came before the court below, about a year before their decision in the present case. It was in the case of *Dunlop* v. *Silver and others*, argued at July term 1801, in Alexandria. The court took the vacation to consider the case, and examine the law, and, at the succeeding term, judgment was rendered for the plaintiff by Kilty, Chief Judge, and Cranch, Assistant Judge, contrary to the opinion of Judge Marshall. . . .

The plea was *non assumpsit*, and a verdict was taken for the plaintiff subject to the opinion of the court, upon the point, whether the holder could maintain an action against the remote indorser of a promissory note.

The statute 3 & 4 Ann. c. 9, respecting promissory notes, is not in force in Virginia; but there is an act of assembly, 1786, c. 29, by which it is enacted, that "an action of debt may be maintained upon a note or writing, by which the person signing the same shall promise or oblige himself to pay a sum of money, or quantity of tobacco, to another;"

[1] This Essay first appeared as Note A to the case of Mandeville v. Riddle, in the Appendix to Cranch's Reports of Cases in the Supreme Court of the United States, vol. I, 1804. Large portions have been omitted, chiefly the detailed quotations of cases.

[2] 1769-1855. Harvard College, A. B. 1787, LL. D. 1829; admitted to the Massachusetts Bar in 1790, and to the Washington Bar in 1794; assistant judge of the Circuit Court of the District of Columbia, 1801-1805; chief justice of the same, 1805-1855.

Other Publications: Reports of Cases in the Circuit Courts of the District of Columbia (6 volumes) and in the Supreme Court of the United States (9 volumes), 1801-1841; author of a code of laws for the District.

and that "assignments of bonds, bills and promissory notes, and other writings obligatory, for payment of money or tobacco, shall be valid; and an assignee of any such may, thereupon, maintain an action of debt in his own name; but shall allow all just discounts, not only against himself, but against the assignor, before notice of the assignment was given to the defendant."

It will be observed, that this act gives no action against the indorser or assignor, nor does it make any distinction between notes payable to order, and those payable only to the payee. Hence, perhaps, it may be inferred, that it left such instruments as the parties themselves, by the original contract, had made (or intended to make) negotiable, to be governed by such principles of law as may be applicable to those instruments. At any rate, it seemed to be admitted, that the act did not affect the present case.

The principal question, then, is, whether this action could have been supported in England, before the statute of Anne.

I. In order to ascertain how the law stood before that statute, it may be necessary to examine how far the custom of merchants, or the *lex mercatoria*, was recognised by the courts of justice, and by what means the common-law forms of judicial proceedings were adapted to its principles. . . .

The custom of merchants is mentioned in 34 Hen. VIII., cited in Bro. Abr., tit. Customs, pl. 59, where it was pleaded, as a custom between merchants throughout the whole realm, and the plea was adjudged bad, because a custom throughout the whole realm was the common law. And for a long time, it was thought necessary to plead it as a custom between merchants of particular places, viz., as a custom among merchants residing in London and merchants in Hamburg, &c. By degrees, however, the courts began to consider it as a general custom. Co. Litt. 182; 2 Inst. 404. . . .

But after this, in the year 1640, in *Eaglechild's Case*, reported in Hetly 167, and Litt. 363, 6 Car. I., it was said to have been ruled (in B. R.), "that upon a bill of exchange between party and party, who were not merchants, there cannot be a declaration upon the law-merchant; but there may be a declaration upon *assumpsit*, and give the acceptance of the

bill in evidence." This decision seemed to confine the operation of the law-merchant, not to contracts of a certain description, but to the persons of merchants: whereas, the custom of merchants is nothing more than a rule of construction of certain contracts. Jac. Law Dict. (Toml. edit.) tit. Custom of Merchants. *Eaglechild's Case*, however, was overruled in the 18 Car. II., B. R. (1666), in the case of *Woodward* v. *Rowe*, 2 Keb. 105, 132, which was an action by the indorsee against the drawer of a bill of exchange. . . . It was afterwards moved again, that this "is only a particular custom among merchants, and not common law; but, *per curiam*, the law of merchants is the law of the land; and the custom is good enough, generally, for any man, without naming him merchant; judgment *pro* plaintiff, *per totam curiam*, and they will intend that he, of whom the value is said to be received by the defendant, was the plaintiff's servant." . . .

In the year 1760 (1 Geo. III.), in the case of *Edie* v. *The East India Company*, 2 Burr. 1226, Mr. Justice FOSTER said, "Much has been said about the custom of merchants; but the custom of merchants, or law of merchants, is the law of the kingdom, and is part of the common law. People do not sufficiently distinguish between customs of different sorts. The true distinction is, between general customs (which are part of the common law) and local customs (which are not so). This custom of merchants is the general law of the kingdom, part of the common law, and, therefore, ought not to have been left to the jury, after it has been already settled by judicial determinations." . . . In the case of *Pillans & Rose* v. *Van Mierop & Hopkins*, 3 Burr. 1669, Lord MANSFIELD says, "the law of merchants and the law of the land is the same; a witness cannot be admitted to prove the law of merchants; we must consider it as a point of law." . . .

This chronological list of authorities tends to elucidate the manner in which the custom of merchants gained an establishment in the courts of law, as part of the common or general law of the land; and shows that it ought not to be considered as a system contrary to the common law, but as an essential constituent part of it, and that it always was of co-equal

authority so far as subjects existed for it to act upon. The reason why it was not recognised by the courts, and reduced to a regular system, as soon as the laws relating to real estate, and the pleas of the crown, seems to be, that in ancient times, the questions of a mercantile nature, in the courts of justice, bore no proportion to those relating to the former subjects. . . .

Another reason, perhaps, why we see so much tardiness in the courts in admitting the principles of commercial law in practice, has been the obstinacy of judicial forms of process, and the difficulty of adapting them to those principles which were not judicially established, until after those forms had acquired a kind of sanctity from their long use. Much of the stability of the English jurisprudence is certainly to be attributed to the permanency of those forms; and although it is right, that established forms should be respected, yet it must be acknowledged, that they have, in some measure, obstructed that gradual amelioration of the jurisprudence of the country, which the progressive improvement of the state of civil society demanded. It required the transcendent talents, and the confidence in those talents, which were possessed by Lord MANSFIELD to remove those obstructions. When he ascended the bench, he found justice fettered in the forms of law. It was his task to burst those fetters, and to transform the chains into instruments of substantial justice. From that time, a new æra commenced in the history of English jurisprudence. His sagacity discovered those intermediate terms, those minor propositions, which seemed wanting to connect the newly-developed principles of commercial law with the ancient doctrines of the common law, and to adapt the accustomed forms to the great and important purposes of substantial justice, in mercantile transactions.

II. Forms of pleading often tend to elucidate the law. By observing the forms of declarations, which have, from time to time, been adapted, in actions upon bills of exchange, we may, perhaps, discover the steps by which the courts allowed actions to be brought upon them, as substantive causes of action, without alleging any consideration for the making or accepting them. The first forms which were used,

take no notice of the custom of merchants, as creating a liability distinct from that which arises at common law; but by making use of several fictions, bring the case within the general principles of actions of *assumpsit*. The oldest form which is recollected, is to be found in Rastell's Entries, fol. 10,(*a*) under the head "Action on the Case upon promise to pay money." Rastell finished his book, as appears by his preface, on the 28th of March 1564, and gathered his forms from four old books of precedents, then existing. This declaration sets forth that

A. complains of B. &c., for that whereas, the said A., by a certain I. C., his sufficient attorney, factor and deputy in this behalf, on such a day and year, at L., at the special instance and request of the said B., had delivered to the said B., by the hand of the said I. C., to the proper use of the said B., 110*l*. 8*s*. 4*d*. lawful money of England; for which said 110*l*. 8*s*. 4*d*., so to the said B. delivered, he, the said B., then and there, to the said I. C. (then being the sufficient attorney, factor and deputy of the said A. in this behalf) faithfully promised and undertook, that a certain John of G. well and faithfully would content and pay to Reginald S. (on such a day and year, and always afterwards, hitherto the sufficient deputy, factor and attorney of the said A. in this behalf), 443 2-3 ducats, on a certain day in the declaration mentioned. And if the aforesaid John of G. should not pay and content the said Reginald S. the said 443 2-3 ducats at the time above limited, that then the said B. would well and faithfully pay and content the said A. 110*l*. 8*s*. 4*d*., lawful money of England, with all damages and interest thereof, whenever he should be thereunto by the said A. requested. It then avers, that the said 443 2-3 ducats were of the value of 110*l*. 8*s*. 4*d*., lawful money of England, that John of G. had not paid the ducats to Reginald S., and that if he had paid them "to the said R., I. B., and associates, or to either of them, then the said 443 2-3 ducats would have come to the benefit and profit of the said A. Yet the said B., contriving, the aforesaid A., of the said 110*l*. 8*s*. 4*d*. and of the damages and interest thereof, falsely and subtly to deceive and defraud, the same, or any part thereof, to the said A., although often thereunto required, according to his promise and undertaking aforesaid, had not paid, or in any manner contented, whereby the said A., not only the profit and gain which he, the said A., with the said 110*l*. 8*s*. 4*d*., in lawfully bargaining and carrying on commerce might have acquired, hath lost; but also the said A., in his credit towards diverse subjects of our lord the king (especially towards R. H. and I. A., to whom the said A.

was indebted in the sum of 110*l.* 8*s.* 4*d.*, and to whom the said A. had promised to pay the same 110*l.* 8*s.* 4*d.*, at a day now past, in the hope of a faithful performance of the promise and undertaking aforesaid), is much injured, to his damage," &c.

This declaration seems to have been by the indorsee of a bill of exchange, against the drawer. For although nothing is said of a bill of exchange, or of the custom of merchants, yet the facts stated will apply to no other transaction. It appears, that ducats were to be given for pounds sterling; this was in fact an exchange. Again, the defendant promised to repay the original money advanced, with all damages and interest; this is the precise obligation of the drawer of a bill of exchange, according to the law-merchant. . . .

In the oldest books extant in the English language on the subject of the law-merchant, viz., Malynes' Lex Mercatoria, written in 1622, and Marius's Advice, which appeared in 1651, it is said, that regularly there are four persons concerned in the negotiating a bill of exchange. A., a merchant in Hamburg, wanting to remit money to D., in England, pays his money to B., a banker in Hamburg, who draws a bill on C., his correspondent or factor in England, payable to D., in England, for value received of A. But in the declaration above recited, there are five persons concerned; and if, as is supposed, that transaction was upon a bill of exchange, the fifth person must have been an indorsee, or assignee of the bill. Another reason for supposing this to be the case, is, that Rastell has no other form of a declaration by an indorsee, although he has two by the payee, viz., one against an acceptor and one against a drawer. . . .

These are the greater part of the precedents of declarations on bills of exchange, to be found in the printed books, before the statute of Anne; and in all of them, those facts are stated which bring the case within the principles which were considered as necessary to support the action of *assumpsit*, in general cases, at common law. In the more modern forms, the liability of the defendant, under the custom, is considered as a sufficient consideration to raise an *assumpsit*, without averring those intermediate steps which may be considered as the links of the chain of privity which connects the plaintiff with the defendant. The reason of this change of

form was, probably, the consideration that those intermediate links were only fictions, or presumptions of law, which were never necessary to be stated. . . .

III. Having thus seen how the law-merchant was understood, at the time of the statute of Anne, and the manner in which it was applied to the forms of judicial process, it will now be necessary to inquire, at what time the law-merchant was considered as applicable to inland bills, and what was the law respecting such bills and promissory notes, prior to the statutes of 9 & 10 Wm. III., c. 17, and 3 & 4 Ann., c. 9.

It is not ascertained exactly at what time *inland bills* first came into use in England, or at what period they were first considered as entitled to the privileges of bills of exchange, under the law-merchant. But there was a time, when the law-merchant was considered as "confined to cases where one of the parties was a merchant stranger," 3 Woodeson, 109; and when those bills of exchange only were entitled to its privileges, one of the parties to which was a foreign merchant. This seems to have been the case, at the time [1622] when Malynes wrote his Lex Mercatoria, in the 4th page of which, he says, "He that continually dealeth in buying and selling of commodities, or by way of permutation of wares, both at home and abroad in foreign parts, is a merchant." It may be observed also, that Malynes takes no notice of inland bills; hence, we may presume, that they were not in use in his time. . . . In the case of *Bromwich* v. *Loyd*, 2 Lutw. 1585 (Hil., 8 Wm. III., C. B.) Chief Justice TREBY said, "that bills of exchange at first were extended only to merchant strangers, trading with English merchants; and afterwards, to inland bills between merchants trading one with another here in England; and after that, to all traders and dealers, and of late, to all persons, trading or not." And in *Buller* v. *Crips*, 6 Mod. 29 (2 Ann.), Lord Chief Justice HOLT said, he remembered "when actions upon inland bills of exchange first began."

Perhaps Lord HOLT might have been correct as to the time when actions upon inland bills first began, or rather when the first notice was taken of a difference between inland and foreign bills; but it appears probable, that inland bills were in

use much before Lord HOLT's remembrance. Marius first published his Advice concerning Bills of Exchange, in 1651, half a century before Lord HOLT sat in the case of *Buller* v. *Crips*, as appears by Marius's preface to his second edition; and he there says, he has been twenty-four years a notary-public, and in the practice of protesting "inland instruments and outland instruments." In p. 2, speaking of a bill between merchants in England, he says, it is "in all things as effectual and binding as any bill of exchange made beyond seas, and payable here in England, which we used to call an outland bill, and the other an inland bill." If we go back twenty-four years from 1651, the time when Marius first published his Advice, it will bring us to the year 1627; but if we go back twenty-four years from 1670, the probable date of his 2d edition (which was probably his meaning), it will give us the year 1646, as the earliest date to which we can trace them. As Malynes, in his Lex Mercatoria, of 1622, does not notice them, and as Marius mentions them as existing in 1646, it seems probable, that they began to be in use between those two periods. . . .

It is certain, that *promissory notes* were in use upon the continent, in those commercial cities and towns with which England carried on the greatest trade, long before that period; and were negotiable under the custom of merchants, in the countries from whence England adopted the greater part of her commercial law. They were called bills obligatory, or bills of debt, and are described with great accuracy by Malynes, in his Lex Mercatoria, p. 71, 72, &c., where he gives the form of such a bill, which is copied by Molloy, in p. 447 (7th edition, London, 1722), and will be found in substance exactly like a modern promissory note.

"I, A. B., merchant of Amsterdam, do, by these presents, acknowledge to be indebted to the honest C. D., English merchant, dwelling at Middleborough, in the sum of 500*l.* current money, for merchandise, which is for commodities received of him to my content; which sum of 500*l.* as aforesaid, I do hereby promise to pay unto the said C. D. (or the bringer hereof), within six months after the date of these presents. In witness whereof, I have subscribed the same, at Amsterdam, this —— day of July, ——."

This is nothing more than a verbose promissory note, which, stripped of its redundancies, is simply this: For value received, I promise to pay to C. D., or bearer, 500*l.* in six months after date. . . .

As Malynes says nothing of inland bills, and yet is so very particular respecting promissory notes, the probability is, that the antiquity of the latter is greater than that of the former, and that they were more certainly within the custom of merchants. Indeed, there is a case prior to any in the books upon inland bills, which is believed to have brought upon such a promissory note, or bill obligatory, as is described by Malynes. It is in Godbolt 49 (Mich., 28 & 29 Eliz., Anno 1586),

"An action of debt was brought upon a *concessit solvere*, according to the law-merchant, and the custom of the city of Bristow, and an exception was taken, because the plaintiff did not make mention in the declaration of the custom; but because in the end of his plea he said '*protestando, se sequi querelam secundum consuetudinem civitatis Bristow,*' the same was awarded to be good; and the exception disallowed."

Lord Ch. Baron Comyns, in his Digest, tit. Merchant, F. 1, F. 2, in abridging the substance of what Malynes had said upon the subject of bills of debt, or bills obligatory, does not hesitate to state the law to be, that "payment by a merchant shall be made in money or by bill. Payment by bill, is by bill of debt, bill of credit or bill of exchange. A bill of debt, or bill obligatory is, when a merchant by his writing acknowledges himself in debt to another in such a sum, to be paid at such a day, and subscribes it, at a day and place certain. Sometimes, a seal is put to it. But such bill binds by the custom of merchants, without seal, witness or delivery. So it may be made payable to bearer, and upon demand. So, it is sufficient, if it be made and subscribed by the merchant's servant. So, a bill of debt may be assigned to another *toties quoties*. And now by the stat. 3 & 4 Anne, c. 9, all notes in writing, made and signed by any person, or the servant or agent," &c. (reciting the terms of the statute). By thus arranging his quotations from Malynes under the same head

with the statute of Anne respecting promissory notes, it is to be inferred, that he considered the custom of merchants, respecting bills of debt, as stated by Malynes, to be the cause or origin of the statute respecting promissory notes; and by connecting the former with the latter by the conjunction "and," it seems to be strongly implied, that he considered the statute only as a confirmation of what was law before. That he was correct in this opinion, and that the foreign custom of merchants respecting promissory notes, mentioned by Malynes, was gradually and imperceptibly engrafted into the English law-merchant, at the same time, and under the same sanction with inland bills, and that that custom was acknowledged repeatedly by solemn legal adjudications in the English courts, before the statute of Anne, will probably be admitted when the authorities are examined, which will be presented in the following pages. A greater degree of weight will be attached to the opinion of Comyns, when it is recollected, that he was either at the bar or on the bench, during the reigns of King William III., Queen Anne, Geo. I. and Geo. II., and must, therefore, have known how the law stood before the statute, what motives produced it, and what was the true intent of the parliament in passing it. . . .

The time when inland bills and promissory notes began to be in general use in England, was probably about the year 1645 or 1646; and their general use at that time may be accounted for by the facts stated in Anderson's Hist. of Commerce, vol. 1, p. 386, 402, 484, 492, 493, 519 and 520. In the year 1638 or 1640, King Charles forcibly borrowed 200,000*l.* of the merchants of London, "who had lodged their money in the king's mint, in the tower, which place, before banking with goldsmiths came into use, in London, was made a kind of bank or repository for merchants therein safely to lodge their money; but which, after this compulsory loan, was never trusted in that way any more. Afterwards, they generally trusted their cash with their servants, until the civil war broke out, when it was very customary for their apprentices and clerks to leave their masters, and go into the army. Whereupon, the merchants began, about the year 1645, to lodge their cash in goldsmiths' hands, both to receive and pay

for them; until which time, the whole and proper business of London goldsmiths was, to buy and sell plate and foreign coins of gold and silver," &c.

"This account," says Anderson, "we have from a scarce and most curious small pamphlet, printed in 1676, entitled 'The mystery of the new-fashioned goldsmiths or bankers discovered, in eight quarto pages,' from which he extracts the following passage: 'Such merchants' servants as still kept their masters' running cash, had fallen into a way of clandestinely lending it to the goldsmiths at four pence per cent. per diem; who, by these and such like means, were enabled to lend out great quantities of cash to necessitous merchants and others, weekly or monthly, at high interest; and also began to discount the merchants' bills, at the like or a higher rate of interest. That much about this time, they (the goldsmiths or new-fashioned bankers) began to receive the rents of gentlemen's estates remitted to town, and to allow them and others, who put cash into their hands, some interest for it, if it remained a single month in their hands, or even a lesser time. This was a great allurement for people to put their money into their hands, which would bear interest until the day they wanted it; and they could also draw it out by 100*l*. or 50*l*. &c., at a time, as they wanted it, with infinitely less trouble than if they had lent it out on either real or personal security. The consequence was, that it quickly brought a great quantity of cash into their hands; so that the chief or greater part of them were now enabled to supply Cromwell with money, in advance on the revenues, as his occasions required, upon great advantage to themselves.'

"After the restoration, King Charles being in want of money, they took ten per cent. of him barefacedly; and by private contract on many bills, orders, tallies and debts of that king, they got twenty, sometimes thirty per cent. to the great dishonor of the government. This great gain induced the goldsmiths to become more and more lenders to the king; to anticipate all the revenue; to take every grant of parliament into pawn, as soon as it was given; also to outvie each other in buying and taking to pawn, bills, orders and tallies; so that in effect all the revenue passed through their hands. And so they went on, till the fatal shutting of the exchequer, in the year 1672. . . ."

This short history of the goldsmiths will account for the sudden increase of paper credit, after the year 1645, and renders it extremely probable, that inland bills and promissory notes were in very general use and circulation. Indeed, we know that to be the fact, from the cases in the books;

upon examining which, we shall find, that there was no distinction made between inland bills of exchange and promissory notes; they were both called bills; they were both called notes; sometimes, they were called "bills or notes." Neither the word "inland," nor the word "promissory," was at this time in use, as applied to distinguish the one species of paper from the other. The term "promissory note" does not seem to have obtained a general use, until after the statute. There was no distinction made, either by the bench, by the bar, or by merchants, between a promissory note and an inland bill, and this is the cause of that obscurity in the reports of mercantile cases during the reigns of Charles II., James II., and King William, of which Lord MANSFIELD complained so much in the case of *Grant* v. *Vaughan*, 3 Burr. 1525, and 1 W. Bl. 488; where he says, that in all the cases in King William's time "there is great confusion; for without searching the record, one cannot tell whether they arose upon promissory notes, or inland bills of exchange. For the reporters do not express themselves with sufficient precision, but use the words 'note' and 'bill' promiscuously." This want of precision is apparent enough to us, who now (since the decision of Lord HOLT in the case of *Clerk* v. *Martin*) read the cases decided by him before that time; but at the time of reporting them, there was no want of precision in the reporter, for there was not, in fact, and never had been suggested, a difference in law between a promissory note and an inland bill. They both came into use at the same time, were of equal benefit to commerce, depended upon the same principles, and were supported by the same law.

IV. The case of *Edgar* v. *Chut*, or *Chat* v. *Edgar*, reported in 1 Keb. 592, 636 (Mich. 15 Car. II., Anno 1663), seems to be the first in the books which appears clearly to be upon an inland bill of exchange. Without doubt, many had preceded it, and passed *sub silentio*. The case was this: A butcher had bought cattle of a grazier, but not having the money to pay for them, and knowing that the parson of the parish had money in London, he obtained (by promising to pay for it) the parson's order or bill on his correspondent, a merchant in London, in favor of the grazier. The parson

having doubts of the credit of the butcher, wrote secretly to his correspondent, not to pay the money to the grazier, until the butcher had paid the parson. In consequence of which, the London merchant did not pay the draft, and the grazier brought his suit against the parson, and declared on the custom of merchants. It was moved in arrest of judgment, that neither the drawer nor the payee was a merchant; but it was held to be sufficient, that the drawee was a merchant. . . .

The case of *Shelden* v. *Hentley*, 2 Show. 161 (33 Car. II., B. R., Anno 1680), was

"upon a note under seal, whereby the defendant promised to pay to the bearer thereof, upon delivery of the note, 100*l.*, and avers that it was delivered to him (meaning the defendant), by the bearer thereof, and that he (the plaintiff) was so." It was objected, that this was no deed, because there was no person named in the deed to take by it. But it was answered, that it was not a deed until delivered, and then it was a deed to the plaintiff. COURT. "The person seems sufficiently described, at the time that 'tis made a deed, which is at its delivery: and suppose, a bond were now made to the Lord Mayor of London, and the party seals it, and after this man's mayoralty is out, he delivers the bond to the subsequent mayor, this is good; *et traditio facit chartam loqui.* And by the delivery, he expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall be paid. But Mr. Justice JONES said, it was the custom of merchants that made that good."

Here, it will be observed, that the court, in order to elucidate the subject before them, refer to principles of law more certain and better known, viz., that a promissory note payable to bearer is good, and that promissory notes were within the custom of merchants. . . .

If any doubt could remain, that the case of *Hill* v. *Lewis* had fully settled the law, that promissory notes were within the custom of merchants, that doubt must have been completely removed by the case of *Williams* v. *Williams*, decided at the next term in the same year, in the king's bench (viz., Pasch., 5 W. & M., Anno 1692), Carth. 269.

The plaintiff, Thomas Williams, being a goldsmith in Lombard street, brought an action on the case against Joseph Williams,

the projector of the diving engine, and declared upon a note drawn by one John Pullin, by which he promised to pay 12*l.* 10*s.* to the said Joseph Williams, on a day certain; and he indorsed the note to one Daniel Foe, who indorsed it to the plaintiff, for like value received. And now, the plaintiff, as second indorsee, declared in this manner, viz., "that the city of London is an ancient city, and that there is, and from the time to the contrary whereof the memory of man doth not exist, there hath been, a certain ancient and laudable custom among merchants, and other persons residing and exercising commerce, within this realm of England, used and approved, viz., &c. So sets forth the custom of merchants concerning notes so drawn and indorsed *ut supra,* by which the first indorser is made liable, as well as the second, upon failure of the drawer, and then sets forth the fact thus, viz.: And whereas also, a certain John Pullin, who had commerce by way of merchandising, &c., on such a day, at London aforesaid, to wit, in the parish of St. Mary le Bow, in the ward of Cheap, according to the usage and custom of merchants, made a certain bill or note in writing, subscribed with his name, bearing date, &c., and by the said bill or note, promised to pay, &c., setting forth the note; and further, that it was indorsed by the defendant to Foe, and by Foe to the plaintiff, according to the usage and custom of merchants; and that the drawer having notice thereof, refused to pay the money, whereby the defendant, according to the usage and custom of merchants, became liable to the plaintiff, and in consideration thereof, promised to pay it, &c., alleging that they were all persons who traded by way of merchandise, &c.

"To this, the defendant pleaded a frivolous plea, and the plaintiff demurred; and upon the first opening of the matter, had judgment in B. R. And now, the defendant brought a writ of error in the exchequer chamber, and the only error insisted on was, that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is), but had declared on a custom through all England, and if so, it is the common law, and then it ought not to be set out by way of custom; and if it is a custom, then it ought to be laid in some particular place, from whence a venue might arise to try it. To which it was answered, that this custom of merchants concerning bills of exchange is part of the common law, of which the judges will take notice *ex officio,* as it was resolved in the case of *Carter* v. *Downish,* and therefore, it is needless to set forth the custom specially in the declaration, for it is sufficient to say, that such a person, according to the usage and custom of merchants, drew the bill; therefore, all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it. The judgment was affirmed."

There cannot be a stronger case than this. On demurrer, judgment was rendered for the plaintiff in the king's bench, which judgment was affirmed, upon argument, upon a writ of error in the exchequer chamber, on the very point of the custom; so that here was the unanimous concurrence of all the judges of England. This case, it is believed, has never been denied to be law, either before or since the statute of Anne. A short note of this case is to be found in 3 Salk. 68, by the name of *Williams* v. *Field*, in these words, "Ruled, that where a *bill* is drawn payable to W. R., or order, and he indorses it to B., who indorses it to C., and he indorses it to B., the last indorsee may bring an action against any of the indorsers, because every indorsement is a new bill, and implies a warranty by the indorser, that the money shall be paid." . . .

Hawkins v. *Cardy*, in the next year (Mich., 10 Wm. III., B. R.), 1 Ld. Raym. 360; 1 Salk. 65; Carth. 466, was also upon a promissory note.

"The plaintiff brought an action on the case, upon a bill of exchange" (says the reporter), "against the defendant, and declared upon the custom of merchants, which he showed to be thus: that if any merchant subscribes a bill, by which he promises to pay a sum of money to another man, or his order, and afterwards, the person to whom the bill was made payable, indorses the said bill, for the payment of the whole sum therein contained, or any part thereof, to another man, the first drawer is obliged to pay the sum so indorsed to the person to whom it is indorsed payable; and then the plaintiff shows that the defendant being a merchant, subscribed a bill of 46*l.* 19*s.* payable to Blackman, or order; that Blackman indorsed 43*l.* 4*s.* of it, payable to the plaintiff," &c. On demurrer, the declaration was adjudged ill; "for a man cannot apportion such personal contract; for he cannot make a man liable to two actions, where by the contract he is liable but to one." "But if the plaintiff had acknowledged the receipt of the 3*l.* 15*s.* the declaration had been good." And HOLT, Chief Justice, said, "that this is not a particular local custom, but the common custom of merchants, of which the law takes notice." Salkeld, in reporting this case, begins thus: "A. having a bill of exchange upon B., indorses part of it to I. S., who brings an action for his part," &c.

This, compared with Lord Raymond's report of the case, shows what has been already so often mentioned, that no

difference had yet been discovered between the law respecting promissory notes, and that concerning inland bills of exchange. Even Lord Raymond states it first to be a bill of exchange, and immediately shows it to have been a promissory note. So glaring a contradiction could not have passed uncorrected, if a promissory note and an inland bill of exchange had not been considered as the same thing. In this case, it will be remarked, that upon demurrer, the court said, that this declaration, upon the custom of merchants, on a promissory note, by the indorsee against the maker, would have been good, if the receipt of the 3*l*. 15*s*. had been acknowledged. . . .

We have now examined all the reported cases upon promissory notes, from the time of the first introduction of inland bills, to the time of Lord HOLT's decision in the case of *Clerke* v. *Martin*. At least, if any others are to be found, they have escaped a diligent search. They form a series of decisions for a period of more than thirty years, in which we discover an uncommon degree of unanimity as well as of uniformity. We find the law clearly established to be the same upon promissory notes as upon inland bills; and we find no evidence that the latter were in use before the former. There is not a contradictory case, or even *dictum*, unless we consider as such the doubt expressed in the case of *Butcher* v. *Swift*, cited by Comyns; but that case is not reported, and therefore, it is impossible to say, upon what ground the doubt was suggested. The cases upon promissory notes and inland bills go to establish not only their likeness in every respect, but even their identity; for the former are almost uniformly called inland bills.

V. Upon examining the printed books of precedents, during the above period, we shall find that the common usage was, to declare upon a promissory note, as upon an inland bill of exchange.

The first precedent of a declaration upon a promissory note is that in Brownlow, Latine Redivivum, p. 74, which is prior [1678] to any of the declarations upon inland bills of exchange. It is, in substance, as follows, that there is, and was, from time immemorial, a custom among merchants at

the city of Exeter, and merchants at Crozict, that if any merchant at Crozict should make any bill of exchange, and by the said bill should acknowledge himself to be indebted to another merchant, in any sum of money, to be paid to such other merchant, or his order, and such merchant to whom the same should be payable, should order such sum to be paid to another merchant, and such merchant to whom the same was payable, should request the merchant who acknowledged himself so as aforesaid to be indebted, to pay such sum to such other merchant to whom he had ordered the money to be paid; and if, upon such request, the merchant who acknowledged himself to be indebted in the sum in such bill and indorsement mentioned, should accept thereof, then he would become chargeable to pay the said sum to the person to whom it was by the said bill and indorsement directed to be paid, at the time in the said bill mentioned, according to the tenor thereof. It then avers, that on the 8th May 1678, the defendant, according to the custom aforesaid, acknowledged himself to be indebted to one M. M. in 52*s*., which he obliged himself and his assigns (this is probably misprinted) to pay to the said M. M., who, by indorsement on the same bill of exchange, on ——, at ——, ordered the money to be paid to the plaintiff, which bill of exchange afterwards, to wit, on ——, at ——, the defendant saw and accepted, by which acceptance, and by the usage aforesaid, the defendant became liable, &c., and in consideration thereof, promised to pay, &c. There is, in the same book, p. 77, a declaration upon a bill of exchange at double usance, which is probably upon an inland bill, as the custom is alleged, generally, among merchants, but does not say at what place. . . .

In 2 Mod. Intr. 126, is another declaration upon the custom, by the indorsee against the maker of three promissory notes, dated in 1697. This declaration is precisely like a modern declaration upon a promissory note, excepting that the note is called a bill, and is said to be made and indorsed "according to the custom of merchants," "whereby, according to the custom of merchants," the defendant became liable, and so being liable, &c. In p. 122, is another by payee *v*. the maker of a promissory note, calling it a "bill or note," and

setting forth the custom specially. In every case upon a promissory note, the declaration is grounded on the custom of merchants.

Upon a review of this list of authorities and precedents, we are at a loss to imagine from what motive, and upon what grounds, Lord HOLT could at once undertake to overrule all these cases, and totally change the law as to promissory notes: and why he should admit inland bills of exchange to be within the custom of merchants, and deny that privilege to promissory notes; when the same evidence which proved the former to be within the custom, equally proved that it extended to the latter. By examining the books, it will be found, that most of the points which have been decided respecting inland bills of exchange, have been decided upon cases on promissory notes. If he considered promissory notes as a new invention, when compared with inland bills of exchange, he seems to have mistaken the fact; for the probability is, that the former are the most ancient, or, to say the least, are of equal antiquity.

VI. But let us proceed to examine the case of *Clerke* v. *Martin* (Pasch., 1 Anne, B. R., 2 Ld. Raym. 757; 1 Salk. 129), upon which alone is founded the assertion in modern books "that before the statute of Anne, promissory notes were not assignable or indorsable over, within the custom of merchants, so as to enable the indorsee to bring an action in his own name against the maker." The case is thus reported by Lord Raymond:

"The plaintiff brought an action upon the case, against the defendant, upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another was upon the custom of merchants, as upon a bill of exchange; and showed that the defendant gave a note subscribed by himself, by which he promised to pay —— to the plaintiff, or his order, &c. Upon *non assumpsit,* a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment, that this note was not a bill of exchange, within the custom of merchants, and therefore, the plaintiff, having declared upon it as such, was wrong; but that the proper way, in such cases, is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it.

"But it was argued by Sir Bartholomew Shower, the last Michaelmas term, for the plaintiff, that this note being payable

to the plaintiff or his order, was a bill of exchange, inasmuch as, by its nature, it was negotiable; and that distinguishes it from a note payable to I. S., or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently, not negotiable, and therefore, it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to I. N., I. N. might have brought his action upon it, as upon a bill of exchange, and might have declared upon the custom of merchants. Why, then, should it not be, before such indorsement, a bill of exchange to the plaintiff himself, since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is, by consequence, that it shall be a bill of exchange. That there is no difference in reason, between a note which saith, 'I promise to pay to I. S., or order,' &c., and a note which saith, 'I pray you to pay to I. S., or order,' &c., they are both equally negotiable, and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant (2 Vent. 292, *Sarsfield* v. *Witherly*), and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants.

"But HOLT, Chief Justice, was *totis viribus* against the action; and said that this could not be a bill of exchange. That the maintaining of these actions upon such notes, were innovations upon the rules of the common law; and that it amounted to a new sort of specialty, unknown to the common law, and invented in Lombard street, which attempted, in these matters of bills of exchange, to give laws to Westminster Hall. That the continuing to declare upon these notes, upon the custom of merchants, proceeded upon obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of *Sarsfield* v. *Witherly*, he said, he was not satisfied with the judgment of the king's bench, and that he advised the bringing a writ of error.

"GOULD, Justice, said, that he did not remember it had ever been adjudged, that a note in which the subscriber promised to pay, &c., to I. S., or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt; and so it was resolved between *Horton* and *Coggs*, now printed in 3 Lev. 299, but that it was never resolved, that the party himself (to whom such note was payable) could not have an action upon the custom of merchants, upon such a bill. But HOLT, Chief Justice, answered, that it was held in the

said case of *Horton* v. *Coggs*, that such a note was not a bill of exchange, within the custom of merchants. And afterwards, in this Easter term, it was moved again, and the court continued to be of opinion against the action. . . . And judgment was given *quod querens nil capiat per billam*, &c., by the opinion of the whole court." . . .

These five cases, viz., *Clerke* v. *Martin*, *Potter* v. *Pearson*, *Burton* v. *Souter*, *Cutting* v. *Williams*, and *Buller* v. *Crips*, are the only reported cases in which the former decisions were overruled, and it may be observed, that the four last were decided upon the authority of the first, which is to be considered as the leading case; and it is, in that case, therefore, that we are to look for the grounds upon which so great a change of the established law was founded. . . .

Hence, then, we find, from an examination of all the cases before the statute of Anne, that it never was adjudged, that a promissory note for money, payable to order, and indorsed, was not an inland bill of exchange. But we find, that the contrary principle had been recognised, in all the cases, from the time of the first introduction of inland bills and promissory notes, to the first year of Queen Anne, and that in one of them, it had been expressly adjudged, upon demurrer, in the king's bench, and the judgment affirmed, upon argument, in the exchequer chamber, before all the judges of the common pleas and barons of the exchequer, so that it may truly be said to have been solemnly adjudged by all the judges of England. Principles of law so established, are not to be shaken by the breath of a single judge, however great may be his learning, his talents or his virtues. That Lord HOLT possessed these in an eminent degree will never be denied; but he was not exempt from human infirmity. The report itself, in the case of *Clerke* v. *Martin*, shows that, from some cause or other, he was extremely irritated with the goldsmiths of Lombard street, and that his mind was not in a proper state for calm deliberation and sound judgment. The same observation applies to the case of *Buller* v. *Crips*, and is further confirmed, by that of *Ward* v. *Evans*, 2 Ld. Raym. 930, in which his lordship said, "But then I am of opinion, and always was (notwithstanding the noise and cry, that it is

the use of Lombard street, as if the contrary opinion would blow up Lombard street), that the acceptance of such a note is not actual payment." This circumstance has also been noticed by judges and others, in some of the more modern reports.

VII. From this concurrent testimony, it is apparent, that the case of *Clerke* v. *Martin* was a hasty, intemperate decision of Lord HOLT, which was acquiesced in by the other judges, in consequence of his overbearing authority, "which made others yield to him;" and that he so "pertinaciously" adhered to his opinion, as to render it necessary to apply to parliament to overrule him. This, it is believed, is the true origin of the statute of Anne, which did not enact a new law, but simply confirmed the old; the authority of which had been shaken by the late decision of Lord HOLT. This idea is confirmed by the words of the preamble of the statute, which are, "Whereas, it hath been held," that notes in writing, &c., payable to order, "were not assignable or indorsable over, within the custom of merchants," and that the payee could "not maintain an action, by the custom of merchants," against the maker; and that the indorsee "could not, within the said custom of merchants, maintain an action upon such note" against the maker; "therefore, to the intent to encourage trade and commerce," &c., be it enacted, &c., that all notes in writing made and signed by any person, &c., whereby such person, &c., shall promise to pay to any other person, &c., or his order, or unto bearer, any sum of money, &c., "shall be taken and construed to be, by virtue thereof, due and payable to any such person, &c., to whom the same is made payable;" "and also every such note, payable to any person," &c., "or his order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants," and that the payee "may maintain an action for the same, in such manner as he might do upon any inland bill of exchange, made or drawn according to the custom of merchants, against the person, &c., who signed the same." And that the indorsee "may maintain his action," for such sum of money, either against the maker or any of the indorsers, "in like manner

as in cases of inland bills of exchange." Here, it may be observed, that by using the words, "it hath been held," the legislature clearly allude to certain opinions, which they carefully avoid to recognise as law. And in the enacting clause, they say, that such notes "shall be taken and construed to be due and payable," &c., expressing thereby a command to certain persons, without saying expressly that the notes shall be due and payable, &c., for this being the law before, it was not necessary to enact the thing itself, but to instruct the judges how they should construe it. The mischief to be remedied was the opinion which had "been held," not any defect in the law itself. By comparing this act with the cases decided prior to *Clerke* v. *Martin*, it will be found to contain no principles but such as had been fully recognised by the courts of law. It follows, therefore, that it was passed simply to restore the old order of things, which had been disturbed by Lord HOLT.

The only real effect of the statute was to alter a few words in the declaration. The old forms allege that the defendant became liable by reason of the custom of merchants, the new say, that he became liable by force of the statute. Even Lord HOLT himself always admitted, that an *indebitatus assumpsit* for money had and received, or money lent, would lie, and the note would be good evidence of it. His objections were only to the form of the action, and not to the liability of the parties. A promissory note was always as much a mercantile instrument as an inland bill of exchange, and there certainly seems to be more evidence that the former is within the custom of merchants than the latter, and that it was so, at an earlier period, on the continent of Europe, from whence it was introduced into England; and when introduced, it came attended with all the obligations annexed, which the custom had attached to it.

We, sometimes, in modern books, meet with an assertion that a promissory note was not negotiable at common law; this may be true, because a promissory note was not known at common law, if from the term common law we exclude the idea of the custom of merchants. It was a mercantile instrument, introduced under the custom of merchants. But if the custom

of merchants is considered, as it really is, a part of the common law, then the assertion that a promissory note was not negotiable at the common law, is not correct. . . .

IX. The statute of Anne having put the question at rest, no one has taken the pains to examine the real state of the law, prior to the statute, but one writer after another has repeated the assertion, without the least examination. In England, it is of no importance, whether they are correct or not; but in this country, where few of the states have adopted the statute, it becomes interesting to know how the law really stood before. . . .

The observations in these cases from Virginia, respecting promissory notes, may be reduced to three propositions. 1st. That promissory notes were not negotiable, before the statute of Anne, so as to enable the indorsee to bring an action in his own name. 2d. That the act of assembly, by assimilating notes to bonds, shows an intention in the legislature to restrain the negotiability of both within the same limits. 3d. That the negotiability given by the act of assembly to bonds and notes was not "intended for purposes of commerce."

The first of these propositions is clearly incorrect. It never was doubted, until the case of *Clerke* v. *Martin*, in the first year of Queen Anne, that a promissory note was a bill of exchange, even between the payee and the maker. . . .

The second proposition, that the act of assembly, by assimilating notes to bonds, intended to restrain their negotiability within the same limits, contains an argument which, if used at the trial, was not much insisted on, but which seems to be the only ground upon which a doubt can be supported. . . .

In Pennsylvania, a number of cases have occurred, from the whole of which it appears doubtful, whether the statute of Anne is to be considered as having been extended in practice to that state, or whether their actions upon promissory notes are grounded upon the custom of merchants. Their act of assembly of 28th May 1715, seems to have been passed in the full contemplation of the statute of Anne, but it provides a right of action only for the indorsee against the maker, and that only to recover so much "as shall appear to be due at the time of the assignment, in like manner" as the payee

might have done. But it gives no action to the payee against the maker, nor to the indorsee against any of the indorsers. . . .

In the subsequent case of *McCulloch* v. *Houston*, in the supreme court of Pennsylvania, 1 Dall. 441, Chief Justice McKean was of opinion, that the legislature intended to put promissory notes on the same footing as bonds, at least, so far as to admit the equity of a note to follow it into the hands of the indorsee. He says, "before this act, it appears, that actions by the payee of a promissory note were not maintained, nor can they since be maintained, otherwise than by extending the English statute of Anne." And to account for this extension of the statute, he supposes, "that actions upon promissory notes were brought here, soon after the passing of the statute, by attorneys who came from England, and were accustomed to the forms of practice in that kingdom, but did not perhaps nicely attend to the discrimination with regard to the extension, or adoption, of statutes." But this could not have happened in the course of ten years, so as to have established a practice; for we are first to suppose a practice in England under the statute, a subsequent removal of attorneys from England to Pennsylvania, and then a practice in Pennsylvania to be established, and all this between the passing of the statute of Anne in the year 1705, and the act of assembly in 1715. A more probable conjecture seems to be, that the first settlers who came over from England about the year 1683, were well acquainted with the use of promissory notes, and the laws respecting them, as they had been practised upon in that country, for at least thirty years. The first emigrations to Pennsylvania were about the time when the banking business of the goldsmiths was at its greatest height, and it was fifteen or twenty years after the first settlement of Pennsylvania, before a doubt was suggested, whether an action would lie on a promissory note, as an instrument. Hence, it is probable, that actions on such notes were brought in the same manner as they had been used in England, to wit, on the custom of merchants; and upon that ground, and not upon the statute of Anne, probably rests the present practice in Pennsylvania.

The practice in New Hampshire and Massachusetts seems to have the same foundation. They declare upon promissory notes, as instruments, and rely upon the express promise in writing, without alleging a consideration, or referring to any statute or custom whereby the defendant is rendered liable, without a consideration. In Connecticut, it is said by Swift, in his System of the Laws, that the indorsee must sue in the name of the payee; but the payee can maintain an action upon the note, without alleging any custom, or statute or consideration. In New York, they have nearly copied the statute of Anne, as far as it relates to promissory notes, but how the law was considered, before their act of assembly of 1788, we are not informed. In Maryland, the statute of Anne was considered as in force and always practised upon. Their declarations have been precisely in the English form, alleging the defendant to be liable by force of the statute, and the courts have strictly adhered to the adjudications in England. Hence, nothing conclusive can be inferred from the practice of the states.

The third proposition drawn from the reported cases in Virginia is, that the negotiability given to bonds and notes by the act of assembly of that state, was not intended for purposes of commerce. It seems difficult to assign a reason why the legislature should have made bonds and notes assignable, unless it was to enable people to transfer that kind of property which existed in such bonds and notes; and the transfer of property is the only means of commerce. . . . If, therefore, for the purposes of commerce, the legislature intended to make those contracts negotiable, which were not so, either in their nature or by the consent of the parties, it is fair to presume, that they did mean to impede the negotiability of such as were in their own nature negotiable, and were expressly intended to be made so, by the will of the contracting parties? If there were any principles of law which would support the negotiability of a promissory note, payable to order, it cannot be supposed, that the legislature intended, by implication alone, to obstruct their operation. And even admitting that they did not, by the act making bonds and notes assignable, mean, to aid commerce, yet it

cannot be presumed, that they intended to wage war with those commercial principles which were already established.

This brings us back again to the first inquiry, what were the principles upon which the negotiability of promissory notes was supported, before the statute of Anne? If such principles did exist, there seems to be nothing in this act of assembly which prevents their full operation in Virginia.

52. THE EARLY HISTORY OF INSURANCE LAW[1]

By William Reynolds Vance[2]

IT seems so highly improbable that the practice of insurance, now deemed indispensable to the safe conduct of commerce on sea or land, should have been unknown to the Phœnicians, Rhodians, Romans and other ancient commercial peoples, that scholars have subjected ancient writings to the closest scrutiny in the effort to find in them some evidence that insurances were made in early times. The result has been the discovery of accounts of certain transactions which bear such a resemblance to insurance as to have led not a few scholars to the conclusion that insurances were known to the ancients, although the business of underwriting commercial risks was probably not highly developed. Foremost among these writers championing the ancient origin of insurance is Emérigon, whose brilliant and learned *Traité des Assurances*, first published in 1783, is still read with respect and admiration by all students of the subject, and cited as authority in the courts of all civilized countries. In this country the same view has been advocated by Justice Duer, whose discriminating and scholarly Lectures on Marine Insurance were published in 1845, and there are not wanting recent text-writers to reach the same conclusion.[3] The contention that

[1] This Essay first appeared in the Columbia Law Review, 1908, vol. VIII, pp. 1-17, and has been revised by the author for this Collection.

[2] Professor of law, and dean of the faculty of law, in George Washington (Columbian) University, since 1903. Washington & Lee University, A. B. 1892, M. A., 1893, Ph. D. 1895, LL. B., 1897; professor of law in the same, 1897-1902; dean of the law department in the same, 1902-3.
Other Publications: Law of Insurance, 1904.

[3] *E. g.*, Joyce on Insurance (1897), Vol. I, p. 14.

insurance was known to the ancients rests mainly upon certain passages found in the histories of Livy and Suetonius and in the letters of Cicero. Livy tells us that the contractors who undertook to transport provisions and military stores to the troops in Spain stipulated that the government should assume all risk of loss by reason of perils of the sea or capture.[1] In the second passage from Livy,[2] which gives in detail an account of the extensive frauds practised by one Postumius upon the country during the Second Punic War by falsely alleging that his vessels, engaged in the public service, had been wrecked, or by making false returns of the lading of old hulks that were purposely wrecked, it seems to be taken as a matter of course that the government was liable to make good such losses.[3]

Suetonius, in his life of Claudius, states that that emperor, in order to encourage the importation of corn, assumed the risk of loss that might befall the corn merchants through perils of the sea.[4] This passage alone was sufficient to convince Malynes that Claudius "did bring in this most laudible custom of assurances."[5]

Likewise many writers have thought that Cicero refers to a transaction of commercial insurance when he writes to Caninius Sallust, proquæstor, that in his opinion sureties should be procured for any public moneys sent from Laodicea, in order that both he and the government should be protected from the risks of transportation.[6] These passages, of doubtful significance when read in connection with the well-known

[1] Livy, lib. 23, c. 49. "* * * *ut quæ in naves imposuissent ab hostium tempestatisve vi publico periculo essent.*"

[2] Livy, lib. 25, c. 3.

[3] It is stated by Dr. August Böckh that in the time of Alexander the Great a certain Macedonian grandee of Rhodian birth living at Babylon, named Antimones, devised a plan of insuring masters against the loss they might suffer through the escape of slaves required to serve in the army, the insurer requiring a payment of eight drachmas for each slave, and paying to the master of a lost slave the estimated value of such slave. See The Public Economy of the Athenians (Second German Ed., Lamb's Translation), p. 101.

[4] Suetonius, lib. 5, c. 18. "*Nam et negotiatoribus certa lucra proposuit, suscepto in se damno, si cui quid per tempestates accidisset, et naves mercaturæ causa, fabricantibus magna commoda constituit.*"

[5] Malynes, Lex Mercatoria, (1st ed., 1622) 146.

[6] Cicero, Epist. ad Fam., lib. II, Epist. 17. "*Laodiceæ me prædes accepturum arbitror omnis pecuniæ publicæ, ut et mihi et populo cautum*

fact that the rules of general average, and bottomry and respondentia loans, transactions closely related to insurance, were familiar to the ancients,[1] have been considered by these writers adequate evidence that insurance was at least known to the commercial peoples of the ancient world.

On the other hand, a great number of writers on insurance consider that these passages refer to other transactions than insurance, and conclude that insurance was wholly unknown among the ancients. Among these are Grotius [2] and Bynkershoek [3] on the Continent, and Park,[4] Marshall and Hopkins in England.

This conflict of opinion as to the practice of insurance among the ancients is due largely to the fact that some writers restrict the significance of the term "insurance" more narrowly than others. The fact that we find no trace of the insurance contract in the laws of Rome or of any of the other ancient peoples, indicates unquestionably that if the contract of insurance, as known in modern times, was known to the ancients at all, its practical use was so little developed as to have made it insignificant. But if the term

sit sine vecturæ periculo." But the course suggested by Cicero can hardly have been in general use, for, according to Plutarch, when Cato the Younger wished, about the same time, to transport a large sum of public money from Cyprus to Rome he adopted the following curious device to prevent its loss at sea. The money was placed in a large number of small casks, to each of which was attached by means of a long rope a large block of cork. By this means, we are told, the money was carried to Rome with very little loss.

[1] See Moldenhauer, Das Versicherungswesen, p. 9; Walford, Encyclopædia of Insurance, Vol. I, p. 333. In the speech against Lakritos attributed to Demosthenes, but now thought to have been written by some other Athenian advocate about 341 B.C., there is set forth a bottomry bond which contains provisions for general average contribution, and other terms strikingly like those of a modern bottomry bond. For the provisions of the Roman Law governing maritime loans, see *De nautico fenore,* Dig. xxii, 2; Code, iv, 33.

[2] Grotius, De Jure Belli et Pacis, ii, 12, 8, 5.

[3] Bynkershoek, Quæst, Juris Pub. i, 21. "*Adeo tamen ille contractus olim fuit incognitus, ut nec nomen ejus, nec rem ipsam in jure Romano deprehendus.*"

[4] System of the Law of Marine Insurances (1786). This most careful and learned work by Sir James A. Park (afterward Mr. Justice Park of the Common Pleas) is the first orderly treatment in English of the law of insurance. It reflects much of the spirit and genius of Lord Mansfield, with whose whole judicial career the author was personally familiar. (See especially his summary of the argument against the ancient origin of insurance at p. lxi, 8th ed.)

"insurance" be given a broader significance and made to include any kind of conventional arrangement by which one or more persons assume the risk of perils to which others are exposed — that is, an arrangement for aiding the unfortunate — then it is equally unquestionable that insurance is as old as human society itself. Friendly societies organized for the purpose, among others, of extending aid to their unfortunate members from a fund made up of contributions from all, are as old as recorded history. They undoubtedly existed in China and India in the earliest times.[1] Among the Greeks these societies, known as *Eranoi* and *Thiasoi*, are known to have existed as early as the third century before Christ.[2] These Grecian societies were largely religious and ritualistic, but among their chief functions, we learn, was that of providing for the expense of fitting burial for members. Similar societies, called *Collegia*, existed in Rome, where their establishment was attributed to Numa. These also performed many of the functions of benefit insurance societies, providing succor for the sick and aged members, and burial for those deceased.[3] These Roman *Collegia* fell into disfavor

[1] Walford, Encyc. Ins., Vol. IV, p. 380.

[2] Walford, *ibid.;* Martin Saint-Léon, Histoire des Corporations de Metiers, p. 23 *et seq.*

[3] Martin Saint-Léon, Histoire des Corporations de Metiers, p. 24.

At Lanuvium, an ancient Latin town about nine miles distant from Rome, there has been found a marble bearing an inscription which sets forth the constitution and regulations of one of these friendly societies in the time of the Emperor Hadrian (A. D. 117-138). Parts of this inscription are thus translated:

"An Association (*collegium*) constituted under the provisions of a decree of the Roman Senate and People, to the honor of Diana and Antinous, by which decree the privilege is granted of meeting, assembling and acting collectively.

"Anyone desiring to pay a monthly subscription for funeral rites may attend the meetings of the Association; but persons are not allowed, under the color of this Association, to meet more than once a month, and that only for the purpose of contributing for the sepulture of the dead.

"You who are desirous of becoming a new member of this Association, first read through its laws carefully, and so enter it as not afterwards to complain, or to leave a subject of dispute to your heir.

"It is absolutely required by the Association that anyone wishing to enter, shall pay an entrance-fee of one hundred sesterces, give an amphora of good wine, and pay as monthly dues five asses.

"Item; It is resolved that whoever shall have omitted to pay his dues for —— consecutive months, should the fate of humanity befall him, there shall be no claim on the society for his funeral rites, even though he shall have made a will.

under the emperors, but nevertheless continued to exist, with restricted functions and influence, up to the time of the fall of the Empire, and it is probable that their existence was continued in spite of the disorder due to the numerous invasions of Italy until they reappeared in history as the mediæval guilds.[1] Of this, however, there is no documentary proof. It is certain that the guilds, which throughout Europe became so numerous and influential from the eleventh to the eighteenth centuries, possessed very many of the characteristics of the modern mutual benefit association, and, as such, carried on a primitive kind of insurance against the misfortunes incident to sickness and old age.[2]

In England, these guilds existed among the Saxons before the Conquest. We learn that among the purposes of these Saxon guilds was to provide for any member who had had occasion to take the life of anyone, the *wergeld*, or indemnity that, under the Saxon law, was payable to the family of the person slain.[3] It seems that these guilds, in addition to providing, by contribution of the members, aid for the sick and burial of the dead among their number, also furnished indemnity to those who had suffered loss by fire or theft.[4] After the Conquest, the English guilds became numerous and influential. Of one of these, the Guild of St. Katherine, Aldersgate, we learn that the brethren assisted any member if he " falle in poverte, or be aneantised thorw elde or thorw

" Item; It is resolved that upon the death of any member of this Association who has paid his dues, three hundred sesterces shall be appropriated out of the treasury for him: of which sum fifty sesterces shall be distributed at the burning of the corpse. The funeral procession shall be on foot.

" Item; It is resolved that no funeral rites shall be had by him who, from whatsoever cause, has inflicted death on himself.

" Item; It is resolved that when any member of this Association shall be made free, he shall contribute an amphora of good wine."

For the Latin inscription see Kenrick's Roman Sepulchral Inscriptions, p. 67. Also Hopkins' Manual of Marine Insurance, p. 8.

[1] Palgrave's Dict. of Political Economy, Vol. II, p. 209.

[2] See in general Brentano, The History and Development of Guilds.

[3] Lambert, Two Thousand Years of Guild Life, p. 43 *et seq.* Palgrave's Dict. of Political Economy, Vol. II, p. 209.

It is not a very far cry from this savage Saxon form of blood insurance to its modern analogue, employer's liability insurance.

[4] Brentano, The History and Development of Guilds, p. 11; Cheyney, Industrial and Social History of England, p. 72.

fyr oder water, theves or syknesse." [1] Thus we perceive that what are now termed sick benefit insurance and burial insurance have existed from time immemorial, and that, while many of the benevolences of these fraternal associations were charitable merely, yet there is to be found in their history distinct evidence of contractual insurance, and even of mutual fire insurance.

In like manner there may be included under the broad definition of insurance given above agreements made by governments, whether through the medium of enactments or through private contract, in accordance with which indemnity is provided for those who suffer loss from peculiar perils. Such just and proper provisions for the protection of the citizen rendering service to the government are doubtless of great antiquity. As stated above, Livy speaks of the practice whereby the Roman Republic indemnified those engaged in transporting military supplies for losses suffered by perils of the sea or acts of the enemy, as one long established and unquestioned.[2] This undoubtedly was insurance in a limited sense. Indeed, we have evidence that a sort of government insurance was practised in times much earlier than those of which Livy wrote. In the Code of Hamurabi,[3] which must have been enacted at least as early as 2250 B. C., we find a provision that a city in which any man should be robbed of his property should be under obligation to indemnify him for his loss, while if the city and governor permitted such disorder that a person lost his life, the family of the murdered man were entitled to be indemnified from the public treasury.

Furthermore, bottomry and respondentia bonds and the allowing of general average in case of shipwreck and the jettison of the goods of one or more of the joint adventurers, may well be included under the term insurance in its broadest significance, and these were unquestionably known and much used among the ancients, particularly among the Rhodians. The lender of money in bottomry who could claim the repayment of his loan only if the vessel upon whose bottom the

[1] Palgrave's Dict. of Political Economy, *ubi supra;* Brentano, The History and Development of Guilds, p. 20.
[2] Livy, lib. 23, c. 49; lib. 25, c. 3.
[3] §§ 23, 24 (ed. Harper).

loan was made completed the contemplated voyage in safety, was entitled, not merely to the current rate of interest on the money loaned, but also to an added sum which would compensate him for the risk he ran of losing his whole principal, and which, in reality, represented the premium paid upon the risk assumed.[1] We therefore conclude that the principle of insurance, considered as an arrangement whereby a person subjected to any peril may be indemnified for loss on account of such peril, was known to the ancients and made use of by them to a very considerable extent; but that commercial insurance, as practised so extensively in modern times, was either unknown to them or little used.

We are, therefore, safe in concluding that the practice of insurance as an important element of commerce and social economy, has had its origin in relatively recent times, but we cannot with any accuracy fix the date of its beginning nor determine indisputably what city or country is entitled to the credit of having originated it. Some scholars have professed to discover evidence that commercial insurance was first developed in Portugal, while some others favor Spain and Flanders.[2] More recent research, however, made among the ancient records of the Chamber of Commerce of Florence has established satisfactorily that insurance had its origin in the great commercial cities of Northern Italy, where it must have been in common use among the merchants engaged in carrying on the large foreign trade of those cities as early as the beginning of the fourteenth century, and possibly more than a century earlier.[3] Among the records of the

[1] In Chapter XXIII of The Public Economy of the Athenians, by August Böckh (Second German Ed., Lamb's Translation) is found an interesting account of bottomry loans among the Athenians.

[2] See the statement of these conflicting claims in Il Contratto di Assecuratione nel Medio Evo, by Enrico Bensa, 18 p. 42 *et seq.* Richards, in his Insurance (1892), states, without citing authority, that "a Chamber of Assurance was established in Bruges as early as 1310." This can scarcely be correct.

[3] Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 48. Goldschmidt, Handbuch des Handelsrechts, p. 354, *et seq.* This valuable and scholarly treatise contains an exceedingly interesting account of the origin of the practice of insurance in the Middle Ages. At p. 360 the author expresses the opinion that reference is made to insurance in the following extract from an ordinance of the City of Pisa enacted prior to 1233:

Florentine Chamber of Commerce are the books of Francesco del Bene and Company, of Florence, which set forth commercial transactions dating from A. D. 1318. In these books are recorded the items of expense incident to trade in Flemish cloth and other articles. Among these items one frequently finds the cost of insuring the goods in transit.[1] From the character of the references to insurances thus made, we can readily infer that as early as 1318 the custom of making insurances upon goods subject to peril of transportation either on sea or land had become a customary incident of traffic. This fact justifies the conclusion that among these Italian cities insurance had been in use many years before the date of the entry in these old Florentine books. The earliest policy of insurance now extant was made in Genoa in the year 1347. This quaint old document which, it will be observed, was in the form of a promise to repay a fictitious loan upon the happening of any misfortune to the vessel insured,[2] is set forth in all of its barbarous Latin in the note below.[3] The first certain record of an insurance transaction

"Ordinamus, ut si acciderit aliquem vel aliquos cives pisanos in alienis partibus constitutos, navim vel naves aliquos securare — fidantiam vel securitatem ipsis navibus et hominibus eorumque rebus adhibitam ab eisdem — ratain habere debeant, et firmam inviolatamque servare."

There are unsupported statements to the effect that insurance was invented by the Jews to protect their goods during their flight into Italy after their expulsion from France in 1182, and that the Italian merchants learned it from these Jews. See Anderson's History of Commerce, Vol. I, p. 82. The story is inherently improbable. See Duer, Marine Ins., Vol. I, p. 33.

[1] Extracts from Books of Francesco Del Bene e Compagnia di Ferenze, taken from Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 183:

"Messer Lapo e Dosso de' Bardi e Compagne devno avere di XVIIII d'Aprile, anno mille trecento dicenove, per rischio di panni inscritti in qua che ci fecero nella fiera di Proino santaiuolo anno mille trecento, diciotto condotti di Fiandra e di Brabante e di Champagnia e di Francia infino a Firenze a tutto loro rischio del costo e delle spese che ci hanno fatte suso . . .

"i quali panni costarono con tutte ispese condotti in Pisa l. sei mila novecento quarantasette e s. diecenove d. tre a fiorini che montano a ragione di lire otto s. quindici centenaio di rischio siccome ne fece patto e mercato, l. sei cento sette s. diecenove a fiorino. . . ."

[2] This curious form is probably due to the surviving influence of bottomry loans previously of frequent occurrence, but prohibited by the church between 1227 and 1235. Goldschmidt, Handbuch des Handelsrechts, p. 363.

[3] *"In nomine D. Amen. Ego Georgius Lecavellum civis Janue confiteor tibi Bartholomeo Basso filio Bartholomei me habuisse et recepisse a te mutuo gratis et amore libras centum septem Janue. Renuncians ex-*

at Bruges is of the year 1370, but the policy in question was evidently issued by a Genoese underwriter.[1] The earliest trustworthy evidence of the practice of insurance at Barcelona is found in certain ordinances of the City of Barcelona, published in 1435, which contain extensive provisions for the regulation of marine insurance.[2] The particularity of these regulations shows clearly that the practice of insurance had already become extensive and of much importance in the commercial life of the Catalonian city some time before the date mentioned, but it is hardly probable that it antedated the similar practice in the Italian cities, which, as we have seen, certainly existed considerably more than a century earlier than the date of the Barcelona ordinances. Another positive reason for thinking that insurance was of later development in Barcelona than in the Italian cities is found in the earliest extant edition of the *Consolat de Mar*, known to have been published at Barcelona in 1494. This celebrated collection

ceptioni dicte pecunie ex dicta causa non habite, non recepte, non numerate et omni juri.

"Quas libras centum septem Janue, vel totidem ejusdem monete pro ipsis, convenio et prometto tibi solemni stipulatione reddere et restituere tibi aut tuo certo nuncio per me vel meum nuncium.

"usque ad menses sex proxime venturos, salvo et reservato, et hoc sane intellecto, quod si cocha tua de duabus copertis et uno timono, vocata S. Clara que nunc est in portu Janue parata, Deo dante, ire et navigare presentialiter ad Majorichas iverit et navigaverit recto viagio de portu Janue navigando usque ad Majorichas et ibi applicuerit sana et salva, quod tunc et eo casu sit præsens instrumentum cassum et nullius valoris ut si facta non fuisset. Suscipiens in me omnem risicum et periculum dicte quantitatis pecunie quousque dicta cocha aplicuerit Majoricis, navigante recto viagio ut supra. Et etiam si dicta cocha fuerit sana et salva in aliqua parte, usque ad dictos sex menses, sit similiter præsens instrumentum cassum et nullius valoris, ac si factum non fuisset.

"In dictum modum et sub dictis conditionibus promitto tibi dictam solutionem facere, alioquin penam dupli dicte quantitatis pecunie tibi stipulanti dare et solvere promitto cum restitutione damnorum et expensarum que propterea fierent vel sustinerentur litis vel extra, ratis manentibus supra dictis et sub ypotheca et obligatione bonorum meorum, habitorum vel habendorum.

"Actum in Janue in Banchis in angulo domus Carli et Boniface Usumaris fratrum, anno dom. Nat. MCCCXXXVII indit. XV secundum cursum Janue die XXIII Octobris circa vesperas. Testes Nicolaus de Tacio draperius et Johannes de Recho, filius Bonanati cives Janue." [Printed in Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 192.]

[1] Bensa, Il Contratto di Assecurazione nel Medio Evo, p. 48, Genova, 1884.

[2] See Walford, Encyc. Ins., Vol. I, p. 251, where these ordinances are set forth in part. Also Duer, Marine Ins., Vol. I, pp. 34, 35.

of sea laws, which under its Italian name of *Consolato del Mare*, had for three centuries such wide currency throughout Europe, and which is generally believed to have been first published in Barcelona as early as the middle of the thirteenth century, contains no reference whatever to insurance.[1]

It has been generally believed that the contract of insurance was first used in underwriting marine risks, and it is indisputable that it had its earliest and most important development in connection with maritime interests. Nevertheless, it is interesting to observe from these ancient books of Francesco del Bene and Company, the Florentine merchants already referred to, that as early as 1318 insurances were customarily made against loss by reason of dangers incident to land transportation, as well as to that by sea, and that shipments of specie were also at that early day insured just as in modern times.[2]

The daring and adventurous merchants of the Italian cities carried on extensive commerce with all of civilized Europe, and during the fourteenth and fifteenth centuries their practice of insuring their ventures spread with their trade to every considerable trading town of the Continent and of England. The usages of insurance, therefore, readily took on the same international character that had already been impressed upon the other customs of traders engaged in international mercantile pursuits. The usages governing the older forms of commerce, especially maritime usages, had found expression in collections of regulations and ordinances of great antiquity, that came to possess the greatest authority throughout Europe rather by their general acceptance than by force of authoritative enactment. These "sea laws,"[3] as they were known, had their origin much earlier

[1] There is an excellent brief history of the Consolato del Mare, by Sir Travers Twiss, in 9 Encyclopædia Britannica, 317, and of the other ancient sea laws by the same author in 21 Encyclopædia Britannica, 583.

[2] Bensa, Il Contratto di Assecuratione nel Medio Evo, p. 51. It is highly probable that the practice of insurance during the Middle Ages was not so narrowly confined to marine risks as is generally believed. Nicholas Magens, in his essay on Insurance, published at London, in 1755, at p. 267, gives a complete copy of a policy written at Hamburg in 1720, on the lives of certain cattle. Here we have our very modern live-stock insurance!

[3] The history of these sea laws is very uncertain. 21 Encyclopædia

than the beginning of the practice of insuring ventures at sea, for otherwise they would not have been silent on so important an adjunct to successful commerce. But their existence undoubtedly greatly facilitated the rapid growth of a body of international insurance customs, which soon became incorporated with the greater body of commercial usages and became an integral part of the law merchant, having the same sanctions and enforced through the same procedure before conventional merchant courts.

As early as 1411 the business of making contracts of insurance had become of sufficient importance among the Venetians to attract legislative action, for on May 15th of that year we find that an ordinance was passed condemning and prohibiting the prevalent practice among Venetian brokers of underwriting foreign risks. But it is evident that underwriters did not at that early day regard insurance regulations with any greater respect than do their successors of the present time, for in June, 1424, another ordinance again prohibited insurances upon foreign vessels or goods, the preamble carefully explaining that an added reason for not underwriting such risks lay in the fact that war was raging between the Genoese and the Florentines and Catalonians, on which account the Venetians should refrain from aiding any of the belligerents. After this insurance became a favorite subject for regulation, often of a very drastic character. From the texts of these ordinances it is evident that in Venice the business of underwriting early became localized, just as in London it was carried on in Lombard Street, for in these Venetian ordinances it was usually provided that they should be read at noon on the "Street of Insurances at the Rialto." [1]

In 1435 insurance ordinances, still extant, were published at Barcelona. As already stated, the edition of the *Consolat de Mar* published at Barcelona in 1494 contained no reference to insurance, nor did the Laws of Wisby or of the Hanse

Britannica, 583. They are collected and translated in Malynes' Lex Mercatoria and Magens' Essay on Insurance, and in Cleirac's Les Us et Coustumes de la Mer, with extensive comments. They are easily accessible to American students in 30 Federal Cases, Appendix.

[1] For a more complete account of the Venetian ordinances see Hopkins, Marine Ins., p. 20 *et seq.*

Towns, which, though of earlier origin, were published probably about this same time. It seems that these laws of the northern commercial cities were little more than adaptations of the much earlier laws of Oleron, which likewise make no mention of insurance. In 1647 there was published at Bordeaux Cleirac's *Us et Coustumes de la Mer*, which contained the text of the *Guidon de la Mer*. This famous treatise on sea laws, which was compiled by some unknown author of Rouen between the years 1556-1600, treated extensively of marine insurance. In 1681 the Marine Ordinances of Louis XIV were published. These ordinances, supposed to be largely the work of Colbert, Louis XIV's gifted Minister of Finance, provide for the regulation of the business of insurance with a completeness of detail that speaks clearly both of the importance of commercial insurance at that time and of the age and extent of the practice that could make such detail possible. Additional evidence of the important place assumed by insurance during the sixteenth century is found in the publication of treatises on insurance by Santerna[1] in 1552 and by Straccha[2] in 1569. The excellent treatise of Roccus, an eminent jurist of Naples, was not published until 1655, much later than the first English treatise by Gerard Malynes, which first appeared in 1622.

The introduction of the practice of insurance into England is shrouded in the same obscurity that envelops its origin on the Continent. Gerard Malynes, in his quaint treatise on the law merchant, published in 1622, asserts that policies of insurance were written in England at an earlier date than in the Low Countries, and that in fact Antwerp, then in the meridian of its glory, learned the practice of insurance from London. This conclusion he reached through the wording of the policies issued at Antwerp, which "do make mention that it shall be in all things concerning the said assurances as was accustomed to be done in Lombard Street, in London." Malynes' reasoning is far from convincing, and his conclusion is probably incorrect. It is highly probable, however, that

[1] "De Assecurationibus et Sponsionibus Mercatorum." Santerna was a distinguished Portuguese lawyer.
[2] "De Assecurationibus."

the enterprising Lombards who had taken up their residence in London, in many cases as representatives of Italian trading houses, did not long delay in bringing to England the device of having their commercial ventures assured by underwriters which had proved so advantageous to the trade of their Italian associates. The activity of these London Lombards was so great as to give a name to Lombard Street,[1] where they dwelt and carried on business as pawn-brokers, goldsmiths and importers of foreign goods. That the introduction of insurance into England is to be attributed to Italians there resident is not only highly probable in itself, but is also supported by much circumstantial evidence. Thus one of the clauses of the modern Lloyds' policy provides that the policy "shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street." We know also that the earliest policies issued in London of which we have any certain knowledge were written in Italian with English translations attached.[2]

The first certain record of an insurance transaction in England is found in the report of the case of *Emerson* c. *De Sallanova*,[3] determined in a court of admiralty in 1545. Curiously enough the insurance involved in this proceeding was not against the perils of the sea, as might have been expected, but against possible loss consequent upon the withdrawal by the King of France of a safe conduct. The oldest English policy extant, dated September 20, 1547, is set forth in both Italian and English in the report of *Broke* c. *Maynard*, an admiralty cause.[4] The copy of this policy is much mutilated, but a somewhat similar policy involved in *Cavalchant* c. *Maynard*, bearing date only a year later, is found in good condition among the records of the proceedings in admiralty. The English version of this venerable instrument is given in the note below.[5]

[1] Malynes explains the name of Lombard Street by saying that "certain Italians of Lombardy kept there a pawn-house or Lombard" [*cf.* our term "lumber-room"].

[2] See Selden Soc. Pub., Vol. XI, pp. 45-58, where several of these policies are given.

[3] Selden Soc. Pub., Vol. XI, p. lxvi. [4] Selden Soc. Pub., Vol. XI, p. 47.

[5] Selden Soc. Pub., Vol. XI, p. 46.

"In the name of God Amen the XXVIth daye of November, 1548.

It is evident that prior to the time of Lord Mansfield's accession to the bench, the development of insurance law in England followed the same lines as that of the other branches of the law merchant. It was generally understood that the common law courts, which did not recognize the quasi-international customs of merchants, afforded no fit forum for the determination of causes between merchants. Hence all early insurance disputes must have been settled by conventional merchant courts or arbitrators, who, it seems, might be appointed, upon petition, by the Privy Council, the Lord Mayor of London, or by the Court of Admiralty. Thus, in the record of the proceedings before admiralty prior to 1570 we find a petition by the owner of insured goods asking that arbitrators be appointed and the underwriters made to pay, "forasmuche as your said rater hath noe remedye by the ordre and course of the common lawes of the realme, and that the ordre of insurance is not grounded upon the lawes of the realme, but rather a civill and maritime cause to be determined and decided by civilians, or else in the highe courte of Admiraltye." [1]

There were evidently numerous disputes about the payment of insurances, and there were probably many cases in which the underwriters refused to perform the judgments of the merchant courts, whose great weakness lay in the lack of a sheriff, for in the admiralty records for the year 1570 is found a petition on behalf of certain foreign merchants who complained that they could not get their insurance paid. In the same year there was an application by an "Easterling" for the appointment of arbitrators "forasmuche as the matter consistethe muche upon the ordre and usage of merchantes

Thomas Cavalchant and John Gyralde and their company of London make themselves to be assured by the order and accompte of Pauli Ciciny of Messena or of eny other whatsoever they be upon the ship called the Sancta Maria de Porto Salvo patron Matalyno de Maryny or how soo ever better she were called or patronysed upon a hundrithe peaces carseys and fryseys or eny other wares laden or to be laden in Hampton untyll they be arryved in Messena and discharged on lande in good saufty. And the assurers be content that this wrytinge be of as much forse and strength as the best that ever was made or myghte be made in this Lombard strete of London according to the order and customes whereof every oon that assureth, as they that cause them to be assured or content to be bound. And God sende the good shipp in saufty."

[1] Selden Soc. Pub., Vol. XI, p. lxxvi.

by whom rather than by course of law yt may be forwarded and determyned." It is noteworthy that when the Court of Admiralty made the reference, the commission to hear the case ran to certain English and foreign merchants.[1]

The extracts just given from the admiralty records show that the inability of the conventional merchant courts to enforce their judgments compelled the merchants and underwriters to seek more formal and efficient tribunals before which to bring their causes. They first turned to the courts of admiralty, which easily assumed jurisdiction of maritime and foreign contracts of insurance, and readily took cognizance of the customs of merchants. But for some reason, not easily understood, the courts of admiralty did not prove satisfactory tribunals for the determination of insurance causes, and relatively few of such causes were brought before them.[2] Lord Coke's misleading report of *Crane* v. *Bell*,[3] a case decided in 1546, has been the source of several mistaken statements that the writ of prohibition granted in that case by a common law court took away from the admiralty courts all jurisdiction of insurance questions.[4] As a matter of fact, however, *Crane* v. *Bell* had nothing to do with insurance,[5] and we know that admiralty courts still heard insurance cases for nearly half a century after the date of that case.[6]

Whatever may have been the cause, it is clear that the admiralty judges contributed little to the development of insurance law, and that during the latter part of the sixteenth century litigants sometimes felt compelled to carry insurance causes to the common law courts, in some cases even after they had been heard and determined by merchant courts. Lord Coke's report of *Dowdale's Case*[7] refers to

[1] *Ibid.*
[2] *Id.*, Vol. XI, p. lxxx.
[3] 4 Coke Inst., 139.
[4] *E. g.*, Bradley, J., in Insurance Co. *v.* Dunham (1870), 11 Wall. 1, 34.
[5] This is made perfectly clear by Selden Soc. Pub., Vol. VI, pp. lxviii, 129, 229.
[6] *E. g.*, Maye c. Hawkyns (1573), Selden Soc. Pub., Vol. XI, p. 149. In this case the insurer of goods taken by pirates was subrogated to the rights of the insured against Hawkyns, the doughty English admiral, who had recaptured the goods.
[7] 6 Coke's Rep., 46 b. The case referred to is believed to be the earliest common law insurance case of which any record was made.

an action brought in a common law court on an insurance policy in 1588. But manifestly the common law courts of that day, with their highly technical and tedious rules of procedure, as governed by precedents of agricultural rather than mercantile origin, were ill adapted for the settlement of merchants' disputes. Thus it appears that at the beginning of the seventeenth century persons having insurance causes were without a satisfactory tribunal for their determination. The conventional courts could not enforce their judgments, the courts of admiralty had proved inadequate, possibly because of the vexatious jealousy of the common law courts in unreasonably restricting their jurisdiction, while the common law courts were wholly unfit. The merchants and underwriters naturally sought relief from Parliament, and secured, in 1601, the first English insurance act,[1] "for the obtaining whereof," wrote Malynes, "I have sundry times attended the committees of the said Parliament, by whose means the same was enacted not without some difficulty; because there was [*sic*] many suits in law by action of assumpsit before that time upon matters determined by the Commissioners for Assurances, who for want of power and authority could not compel contentious persons to perform their ordinances; and the party dying, the assumpsit was accounted void in law." The preamble of this act is exceedingly interesting, since it not only shows the great importance of the business of insurance at the time of its enactment, and a remarkably clear understanding of the real nature of insurance, but it also gives in striking summary the history of insurance law and practice during the preceding century, which necessitated the establishment of the court created by the act. This preamble, in part, is as follows:

"(2) And whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things

[1] St. 43 Eliz., c. 12.
[2] Lex Mercatoria, p. 106 (3rd ed., 1686).

adventured, or some part thereof, at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance; (3) by means of which policies of assurance it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few, and rather upon them that adventure not than those that do adventure, whereby all merchants, especially of the younger sort, are allured to venture more willingly and more freely; (4) and whereas heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men by reason of their experience fittest to understand, and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their monies of every several assurer, by suits commenced in Her Majesty's courts, to their great charges and delays."

By the provisions of this act authority was given to the Lord Chancellor or to the Lord Keeper of the Great Seal, to issue commissions directed to "the judge of the admiralty for the time being, the recorder of London for the time being, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants, or any five of them," with authority to hear and determine in a summary manner insurance causes. This court of insurance commissioners did not, however, prove successful, owing to the fact that its jurisdiction was confined to causes arising on policies issued in London, and construed not to extend to any other insurances than those on goods. The court was also held to be open only to the insured and not to the underwriter, and its judgments could not be pleaded in bar to a subsequent action at law.[1] We are not surprised, therefore, to learn that this

[1] For the history of the Court of Insurance Commissioners, see Cunningham, Law of Insurances (3rd ed., 1766) pp. 163-169. Also 3 Blackstone's Comm., 74, 75.

special court lapsed into disuse, and died of inanition within a century after its creation.

The failure of this special court seems to have discouraged any further attempts to better an almost intolerable situation, for the hundred and fifty years intervening between the enactment of 43 Eliz. and the appointment of Mansfield as Chief Justice of the Court of King's Bench are almost a barren waste as far as the history of the development of insurance law is concerned. The common law judges did not grow in wisdom or in the favor of those having insurance causes. The merchants and underwriters continued to submit their disputes to arbitrators and commissions, sedulously avoiding the common law courts. It is said that, all told, the reported insurance cases determined at law prior to Lord Mansfield's time did not exceed sixty in number,[1] nor among these can there be found one that clearly establishes a great principle or that can be fairly considered a leading case. So slight was the grasp of the common law judges of this period upon the nature and true function of the contract of insurance that as late as 1746 it was uncertain whether an insurable interest was necessary to support a policy,[2] although the fundamental principle requiring the presence of such an interest was perfectly well understood by the Continental authorities of an earlier time. In 1746, by Statute 19, Geo. II, c. 37, the making of policies without interest was prohibited, as was also the making of reinsurances, under the mistaken impression that they fell under condemnation as wager policies. During this period the doctrine of concealment was applied by the Court of King's Bench in *Seaman* v. *Fonereau*,[3] and the peculiar doctrine of warranties in insurance policies was foreshadowed, rather than definitely declared, in *Jeffery* v. *Legender*,[4] and in *Lethulier's Case*.[5] Add to these a few somewhat uncertain cases on the effect of deviation,[6] and we have practically the sum of the contributions

[1] Park, Marine Ins. (4th ed.) xliii.

[2] Compare Depaba *v.* Ludlow (1720) 1 Comyns 360, with Goddart *v.* Garrett (Chancery, 1692) 2 Vern. 269.

[3] (1743) 2 Strange 1183.

[4] (1691) 3 Lev. 320. [5] (1692) 2 Salk. 443.

[6] Green *v.* Young (1702) 2 Salk. 444; Foster *v.* Wilmer (1745) 2 Strange 1249; Elton *v.* Brogden (1746) 2 Strange 1264.

made to insurance law by common law judges prior to Mansfield.

Lord Mansfield became Chief Justice of the Court of King's Bench in 1756, which may rightly be considered as the date of the beginning of the development of the modern law of insurance as a part of the common law system. This great judge, thanks to his more liberal Scottish training, was not so slavishly attached to common law precedents as to be unable to perceive the necessity of recognizing merchants' customs in determining rights under merchants' contracts, nor so bigoted as to be unwilling to seek light from foreign sources. In insurance causes, as with causes involving other branches of the law merchant, he impanelled juries of merchants and underwriters, to establish customs and usages current among those who made insurances, and diligently consulted the time-honored maritime laws of the Continent, and the treatises of English and Continental writers.[1] Thus he not only gave prompt justice to litigants who appeared before him, and provided a fit tribunal for merchants, but he saw so clearly the fundamentals of the theory of insurance, and understood so well its practical applications to the needs of business and commerce, that the numerous doctrines that he laid down have survived all of the many changes in commercial conditions and methods that have since taken place, and almost without exception they apply as well to the commercial transactions of to-day as to those of Mansfield's own time. When he retired from the bench in 1788, he left a complete system of insurance law, as is so well shown by Sir James Park, a contemporary of Mansfield's, in his brilliant work on marine insurance. This system has been much extended in modern times, but it has been little changed, and still stands as a lasting monument to the great judge whom Mr. Justice Buller[2] rightly called "the founder of the commercial law of this country."

[1] Thus, in Luke *v.* Lyde (1759), 2 Burr, 883, 889, he cites the Rhodian Laws, The Consolato del Mare, The Laws of Oleron and of Wisby, The Ordinances of Louis XIV, and the treatise of Roccus.

[2] In Lickbarrow *v.* Mason (1787), 2 T. R. 73.

53. THE EARLY HISTORY OF THE ENGLISH PATENT SYSTEM[1]

By Edward Wyndham Hulme[2]

IN 1827, when the subject of patent law reform first began to claim the attention of the English Legislature, an effort was made by the Lower House to obtain the data requisite for an investigation of the history of the patent system under the prerogative and at common law. In this year the Crown, in compliance with a resolution of the House, ordered a return to be prepared 'of the titles and dates of all special privileges and patents granted in England previous to March 1, 1623, and stating whether for English or foreign manufactures and inventions.' Unfortunately, the resources of the Keepers of the National Records proved unequal to the demands made upon them; and as a matter of fact the return was never presented. The resolution, nevertheless, deserves to be rescued from oblivion. For, while on the one hand it excludes as foreign to the inquiry an investigation of the commercial privileges of the trading companies, the supposed connexion of which with patents for inventions has misled so many writers upon Patent Law, it includes all grants made in respect of manufactures or inventions irrespective of the nature of the privileges conferred therein. In other words, we are told to look, not for Monopoly patents, but for grants

[1] This essay was first published in four parts in the Law Quarterly Review, 1896-1902, vols. XII, 141-154, XIII, 312-318, XVI, 44-56, XVIII, 280-288, and has been revised and condensed by the author for this Collection.

[2] Librarian of the Patent Office, London. Corpus Christi College, Oxford, B. A., 1880.

Other Publications: Articles in Industries (1893), Engineering (1894), the Antiquary (1894-95), the Library (1898).

to individuals made in furtherance of particular industries. With this clue to guide us we shall at once proceed to inquire, firstly, at what period the Crown by means of its grants first actively interfered in the promotion of industry, and secondly, what relation these grants may be found to bear to the first recorded Monopoly patents of invention. For this purpose we may briefly summarize the conclusions which may be obtained from a perusal of any standard history of industrial progress in this country.

During the period of history known as the Middle Ages, the industrial attainments of the English were far below the level of their continental rivals, France, Germany, Italy, Spain and the Low Countries. Moreover, throughout Europe progress in the manufacturing arts is found to be due, not so much to individual experimental effort, as to the slow infiltration of improved processes, the source of which is ultimately traceable to the more advanced civilization of the East. As late as the sixteenth century the type of English society was mainly that of an agricultural and mining community, exchanging its undressed cloth, wool, hides, tin and lead for the manufactures of the continent and the produce of the East. The rise of the native cloth industry in the fourteenth century gave to this country her first considerable manufacturing industry: and, inasmuch as the development of the industry is universally attributed to the fostering influence of the Crown, it will be necessary to scrutinize somewhat closely the various grants by means of which these results were obtained. For the facts here presented no originality is claimed. Their connexion, however, with the history of patent law has never yet been properly established.

In the letters of protection to John Kempe and his Company dated 1331 (Pat. 5 Ed. iii p. 1, m. 25),[1] will be found the earliest authenticated instance of a Royal grant made with the avowed motive of instructing the English in a new industry. Here we have, not a solitary instance of protection, but the declaration of a distinct and comprehensive pol-

[1] This text will be found in Rymer. A facsimile reproduction forms the frontispiece to Prof. Cunningham's *Alien Immigrants in England.* 1897.

icy in favour of the textile industry; for the grant contains a general promise of like privileges to all foreign weavers, dyers and fullers, on condition of their settling in this country and teaching their arts to those willing to be instructed therein. Nor is this all. In 1337 these letters patent were expressly confirmed by a statute framed for the protection of the new industry, cap. 5 of which enacts, that all cloth-workers of strange lands, of whatsoever country they may be, which will come into England, Ireland, Wales, and Scotland, and within the King's power, shall come safely and surely and shall be in the King's protection and safe-conduct to dwell in the same lands, choosing where they will; and to the intent that the said clothworkers shall have the greater will to come and dwell here, Our Sovereign Lord the King will grant them franchises as many and such as may suffice them.[1]

As it is with the continuity rather than with the success of the new policy that we have here to deal, we shall briefly enumerate in their chronological order the grants which appear to have been issued in furtherance of the above object. In 1336 similar letters were issued (10 Ed. III, Dec. 12) to two Brabant weavers to settle at York in consideration of the value of industry to the Realm. In 1368 (42 Ed. III, p. 1) three clockmakers of Delft were invited to come over for a short period. In the following reign we are informed (Smiles, *Huguenots*, p. 10) that the manufacture of silk and linen was established in London by the king by the introduction of similar colonies from abroad, but whether by letters patent or otherwise has not been ascertained. The first instance of a grant made to the introducer of a newly-invented

[1] In the report of the Hist. MSS. Comm. xiv, pt. viii. p. 7, Lincoln, there is an ordinance dated May 1, 1291, which at first sight carries back this policy of encouragement to a still earlier date. It runs as follows: 'and that men may have the greater will to labour in the making of cloth in England, Ireland, and Wales, We will that all men may know that We will grant suitable franchises to fullers, weavers, and dyers, and other clothworkers who work in this mystery so soon as such franchises are asked of us.' The 'Athenæum,' 1896, however, points out from internal evidence that the true date of the document is probably May 1, 1326. See also Calendar of Patent Rolls, 1327-30 under date May 1, 1327, where it appears that the first act of Ed. III. was to cause a renewal of the 'Ordinance of the late king.'

process will be found in letters patent dated 1440 (18 H. 6. Franc. 18. m. 27) to John of Shiedame, who with his Company was invited to introduce a method of manufacturing salt on a scale hitherto unattempted within the kingdom. Twelve years later, in 1452, a grant was made in favour of three miners and their Company, who were brought over from Bohemia by the king on the ground of their possessing 'meliorem scientiam in Mineriis' (Rymer, xi. 317).

These instances, although, probably, not exhaustive of the industrial grants of the fourteenth and fifteenth centuries, sufficiently illustrate the well-known citation from the Year Book, 40 Ed. III, fol. 17, 18, to the effect that the Crown has power to grant many privileges for the sake of the public good, although prima facie they appear to be clearly against common right.

With the alchemical patents of Henry VI, wrongly assigned by Hindmarch and subsequent writers to the reign of Edward III, we must deal briefly.

In 1435-36 two successive Commissions were appointed to inquire into the feasibility of making the philosopher's stone for medicinal and other purposes. Respecting these Commissions we are assured by Prynne in his *Aurum Reginæ* that they proved 'entirely abortive for aught that he could find.' The fiction of a monopoly having been intended, based upon an obviously inaccurate account in Moore's Reports, p. 671, may be dismissed as the invention of a later date. Other so-called alchemical patents resolve themselves into either warrants for the arrest of the individuals concerned, or dispensations from the penal statute of 5 Henry IV, by which the practice of transmutation was made a felony. In any case the connexion of these grants with the history of patent law must be considered as exceedingly remote.

With the accession of the Tudor dynasty the patent system underwent a characteristic change. In place of the open letters for the furtherance of the national industry, we now find the Crown negotiating for the purpose of attracting skilled foreigners into its own service. Amongst these we may instance the introduction of German armourers, Italian shipwrights and glass-makers, and French iron-founders and

sail-makers. In the absence of any grants recorded in connexion with these transactions, it is impossible to define the precise relations existing between the Crown and the immigrant artisan. The Italian glass-makers introduced circa 1550, i. e. under the protectorate of Somerset, were recalled by the Venetian State; but the French iron-founders appear to have successfully established in the Weald of Sussex the art of casting iron ordnance, which shortly afterwards superseded the older forms of bronze cannon.

The first acts of Elizabeth were directed to the question of national defence. In 1560 the reformation of the coinage was taken in hand, for which purpose a body of Easterling assayers were brought over. In the following year the policy of the promotion of new industries under the special protection of the Crown was inaugurated and steadfastly pursued to the last few years of the reign. As to the legality of the new licenses no scruples appear to have been entertained. The monopolies were not without foreign precedents. Throughout Western Europe the new art of printing was being controlled and regulated by special licenses. With this preface we may leave the following list of grants to speak for itself. Their history from the political and economic standpoints has recently formed the subject of a monograph by Dr. Hyde Price (*English Patents of Monopoly*. Boston, 1906) to which frequent reference will be made. The list, it should be stated, has been prepared from the Calendars of the Patent Rolls of Elizabeth. Its claim to completeness for this reign, therefore, rests mainly upon the sufficiency of these Calendars.

(*Mary. Monopoly Patent*)

No. I. 1554. May 29. License to Burchart Cranick (*See* Grant No. vii *infra*) to mine, break open ground, melt, divide (*i. e.* separate metals) and search for all manner of metals according to an indenture made the 18th May of the same year. For 20 years.

The discovery of this grant is due to Mr. J. W. Gordon, author of *Monopolies by Patents* and other works on the history of

English Patent Law. The above grant contains a prohibition against the use of Cranick's methods for the space of six years.

(*Elizabeth. Monopoly Patents*)

No. I. 1561. Jan. 3. A lycense to Stephen Groyett and Anthony Le Leuryer to make white sope [for 10 years].

The best English soap of the period was a soft potash Bristol soap, 'very sweet and good,' but unsuitable for fine laundry work, for which the hard Spanish soda soap of Castile was preferred. The grant stipulates that two at the least of the servants of the patentees shall be of native birth, and that the soap, which is to be of the white hard variety, shall be as good and fine as is made in the *Sope house of Triana or Syvile*. The patentees are bound to submit their wares for the inspectīon of the municipal authorities, and on proof of defective manufacture the privilege is void. The grant appeared in full in 'Engineering,' June 22, 1894, with a brief outline of the origin of patent law by the present writer.

No. II. 1561. Aug. 8. License to Philip Cockeram and John Barnes to make saltpetre [for 10 years].

At thė date of the grant saltpetre was not manufactured within this country; most of the imported article arriving viâ Antwerp, a port controlled by the Catholic King of Spain. The Queen therefore bargained with Gerard Honricke, 'an almayne Captain,' to come over and teach her subjects 'the true and perfect art of making saltpetre' as good as that made 'beyond the seas,' stipulating, however, that the secrets of the manufacture should be reduced to writing before the promised reward of £300 should be paid. On the arrival of Honricke the Queen resigned her bargain (Pat. 3 Eliz. p. 6) into the hands of the above patentees, who were both London tradesmen. The specification will be found in full in 'Engineering,' June 15, 1894.

In case the new invention (sic) be not proved to be of value within a year, the making of saltpetre to be thrown open as at present.

No. III. 1562. May 26. Privilege to George Cobham, alias Broke, for a dredging machine [for 10 years].

The petition of G. Cobham, Tomazo Chanata, stranger, and their Company endorsed with the erroneous date 1550, is to be found in the *S. P. Dom. Eliz.* vol. i. No. 56.

The patentee represents that 'by diligent travel' he had discovered a machine to scour the entrances to harbours, &c., to a depth of sixteen feet. The patent is for the importation of a sufficient number of these machines. The rights of scouring channels by the older methods are reserved, and the Queen expresses a hope that her favourable treatment of the patentee 'will give courage to others to study and seke for the knowledge of like good engines and devyses.'

No. IV. 1562. Dec. 31. License to Wm. Kendall to make Alum in Devon, Cornwall, &c. [for 20 years].

In the recital of the grant Kendall represents that he had discovered ores of alum in abundance with a practical method of its extraction. The manufacture was started in Devonshire, but failed. *See also* 1564, July 8, Alum patent of Cornelius De Vos.

No. V. 1562. Dec. 31. Patent to John Medley for an instrument for the drayninge of water [for 20 years].

The recital states that mines of tin, lead, coal, &c., in Devon as elsewhere, were drowned and altogether unoccupied, 'owing the great habundance of water.' It is not clear that Medley lays claim to the invention of the present device, although the grant covers all subsequent improvements. The rights of users of old machines are reserved, and clauses are inserted regulating the compensation to be paid for entering upon abandoned properties. In case of disputes arising, the quarrel is to be referred to the Privy Council. The source of inspiration of this and the numerous subsequent patents for mine drainage and water raising will be found in the illustrated work of Agricola published in 1559.

No. VI. 1563. Feb. 26. A license to George Gylpin and Peter Stoughberken to make ovens and furnaces [for 10 years].

In the *S. P. Dom.* 1565 there is a certificate from some London brewers, who testify to the economy of fuel effected by the furnaces of a German, Sebastian Brydigonne, who may have been connected with the above patentees. The grant refers to the growing scarcity of wood fuel, owing to the large consumption

in the brewing and baking trades. The grant is void in case the patentees fail to *come over* and put the grant into practice within two months, or prove extortionate in their charges.

No. VII. 1563. June 22. A license to Burchsard Cranick to make engines for the draining of waters [20 years].

This grant is similar to that of Medley's, but gives some additional powers of entering upon old and abandoned mines under proper restrictions. The engine is stated to have been lately invented, lerned and found out by Cranick, and to be unlike anything devised or used within the realm. Three years are allowed for the patentee to perfect and demonstrate the utility of his engines. Disputes are to be referred to the Warden of the Stannaries and three Justices of the Peace.

No. VIII. 1564. July 3. License to Cornelius de Vos to make Alum and Copperas [for 21 years].

De Vos obtained this grant on the strength of the discovery of ores of alum and copperas (sulphate of iron) in the Isle of Wight (Alum Bay). His rights were shortly afterwards assigned to Lord Mountjoy, who in 1566 obtained parliamentary confirmation of the grant. Both the Queen and Cecil were originally financially interested in the success of the experiment. In 1571 Bristol merchants complain of the decay of their trade owing to the fact that iron and alum, which had hitherto come from Spain, were now made better and cheaper in this country. See also Stow's *Annals*, 1631, pp. 897, 898; Geological Survey, Memoirs, *Jurassic Rocks*, i. 452-454. Hyde Price, p. 82. The grant confers the right to take up workmen at reasonable wages, together with all materials requisite for the manufacture.

Nos. IX, X. 1564. Oct. 10. Commission to Daniel Houghstetter and Thomas Thurland for mining in eight English Counties.
1565. Aug. 10. Special license to the same concerning the provision for the minerals and mines of gold, silver, &c.

The validity of these grants was challenged by the Earl of Northumberland on the ground that the work was within the

Royalties granted to his family in a former reign. The case was decided in favour of the Queen, on the ground that the neglect of the Earl and his predecessors to work the minerals during seventy years 'had made that questionable which for ages was out of question' (Pettus, *Fodinae Regales*). On May 28, 1568, the Company was incorporated by Charter as the Society of the Mines Royal, which existed down to the eighteenth century. *See also* Hyde Price, pp. 49-55 and Grant-Francis, *Copper-smelting*.

No. XI. 1565. Jan. 29. License to Armigil Wade and Wm. Herlle for the manufacture of sulphur and oil [for 30 years] (Latin).

The full text of the grant will be found in Rymer. The sulphur was required for making gunpowder, and the discovery may be attributed to the labours of John Mangleman, a German, who was authorized to search for earth proper for making brimstone (Lansd. MSS.). The second part of the invention related to the extraction of oil from seeds for finishing cloth. The proper machinery for extracting oil from rape and other seeds does not seem to have been known at the period. The grant was subsequently reissued to Wade and another for a further term of thirty years. Cf. No. XXXIV, *infra*.

No. XII. 1565. April 20. License to Roger Heuxtenbury and Bartholomew Verberick for Spanish or beyond sea leather [for 7 years].

The process relates, in all probability, to sumach tanning which produces a white leather suitable for dyeing in light shades. Shoes of Spanish leather, i. e. yellow leather, appear to have been preferred 'to those which shine with blacking' (Howell, Letters, I. i. 39). The grant dispenses with the provisions of an Act forbidding the export of leather. On the other hand, it insists on the employment and instruction of one English apprentice for every foreigner employed, and subjects the industry to the inspection of the Wardens of the Company of the Leather Sellers, who are responsible for 'the skins being well and sufficientlie wrought.' This grant must not be confused with a subsequent license to Andreas de Loo to export pelts which gave great offence to the trade. For evidence as to the use of sumach at this period *see* Library Association, *Leather for Libraries*, pp. 7-8.

Nos. XIII, XIV. 1565. Sept. 17. Two licenses to Wm. Humfry and Christopher Shutz to dig (1) for the Lapis Calaminaris, the manufacture of brass and iron wire and battery wares, (2) for tin, lead, and other ores.

These grants covered geographically those parts of England not included in Houghstetter's patents and the Alum patent of De Vos. Calamine or zinc carbonate is an essential in the manufacture of latten or brass, which it was proposed to use in casting ordnance (*S. P. Dom. Eliz.* vol. 8, No. 14). The mineral was discovered in Somersetshire in 1566, and the first true brass made by the new process was exhibited in 1568. The patentees also erected at Tintern the first mill for drawing wire for use in wool-carding. In 1568 the Company was incorporated by Charter as the 'Company of the Mineral and Battery Works,' and remained under practically the same management as that of the Society of the Mines Royal (Stringer, *Opera Mineralia Explicata*). In 1574, and again in 1581, the assignees of the patent obtained an injunction against several owners of lead mines in Derbyshire for using certain methods of roasting lead ores in a furnace worked by the foot blast and other instruments invented by Humphrey after the date of his patent. The Court of Exchequer ordered models to be made, and after repeated adjournments a Commission was appointed to investigate 'the using of furnaces and syves for the getting, cleansing, and melting of leade Ower at Mendype, and the usage and manner of the syve' (*Exchequer Decrees and Orders*). The depositions in this case are still preserved, but it is impossible to trace the history of the case to its completion. Coke informs us that as regards the use of the sieve, the patent was not upheld on the ground of prior user at Mendip. It is a peculiarity of the grant that it covered all subsequent inventions of the patentees in this particular branch of metallurgy. The hearth was invented after the date of the patent, and one of the questions to be decided was whether a subsequent invention could be covered by letters patent or no. *See also* Hyde Price, pp. 55-60.

No. XV. 1565. July 31. License to Francis Berty to put in practice the trade of making white salt.

The patent was surrendered and reissued in the following year.

No. XVI. 1565. Sept. 7. License to James Acontius for the manufacture of machines for grinding, &c. [for 20 years] (Latin).

Acontius, an Italian engineer, had taken out letters of naturalization and was in receipt of a small Crown pension. The undated petition is to be found in *S. P. Dom. Eliz.* 1559. The real date, no doubt, is 1565.

No. XVII. 1566. Jan. 23. License to Francis Berty for the making of salt.

Berty was a native of Antwerp, and probably introduced the Dutch mode of making salt for fish-curing. The salt was extracted by boiling in copper pans. Plans of the furnaces will be found in *S. P. Dom. Eliz.* 1566. The later salt patents of the reign gave rise to great local discontent, owing to the oppression of the patentees, who claimed the right to control the price of salt within certain areas.

No. XVIII. 1567. Aug. 26. A special license to Peter Anthony van Ghemen [for 21 years] to cut iron, save fuel and extract oil.

In the Lansd. MSS. there is a declaration of the inventions of the above individual and his Company. They consisted of a process of tempering iron so that it might be cut into bars for various purposes, and of special mills for corn and for extracting oil from rape-seed, which for want of proper appliances was sent out of the kingdom to be extracted.

No. XIX. 1567. Sept. 8. License to Anthony Becku and John Carré to make Normandy and Lorraine glass [for 21 years].

Strype, *Eccles. Mem.* records an attempt to introduce Normandy or 'Crown' glass in 1552. In 1557 English glassmakers were said to be 'scant in the land,' the seat of the manufacture, which was confined to small green glass ware, being at Chiddingfold. This patent may be said to have laid the foundation of modern English glass-making; see Antiquary, Nov. 1894—May, 1895 and Hyde Price, pp. 67, etc. It should be noted that the Crown had twice failed to manufacture glass on its own account. The patent insists on the instruction of the English as a condition of the validity of the grant. The attempt to manu-

facture 'Crown' glass appears to have been unsuccessful (*Lansd. MSS.* 76) and to have been abandoned until one Henry Richards brought the art to England in 1679 (*Petition Entry Books*, 2, 359).

No. XX. 1568. Oct. 14. Grant to Peter Backe to collect madder in Ireland and dye skins of animals [for 21 years].

Backe was a native of Brabant — a province noted for its dyers. The English dyers, on the other hand, bore an evil reputation. 'No man almost wyll meddle with any colours of cloth touching wodde and mader, unlesse it beare the name of French and Flaunders dyes, for reason of the deceits practised by the English and the ignorance of the principles of their craft' (Camden Miscellany). The grant covers all parts of Ireland, with special reference to specified counties. Infringement is punishable by one year's imprisonment. Probably the first Irish monopoly grant.

No. XXI. 1568. Nov. 10. License to Peter de la Croce (De la Croix) to make Cendre de Namour [for 7 years].

A patent for dyeing and dressing cloth after the manner of Flanders. English cloth was still exported in the white, undressed condition to be finished abroad. According to the 'Request of a true-hearted Englishman,' dated 1553 (Camden Miscellany), this was due to 'our beastlie blindness and lacke of studyous desire to do things perfectly and well.' But probably the trade was hampered by the absence of the subsidiary industries of oil, alum, &c.

No. XXII. 1569. Apr. 20. A license to Dan. Houghstetter to use the arte of myninge [for 21 yeares].

[See also patent dated Oct. 1564.] The grant is for setting up and using engines for mine drainage.

No. XXIII. 1569. May 26. License to John Hastinges to make clothes called Frestadowes [for 21 years].

Frisadoes may be regarded as a variety of 'broad bayes,' but of a somewhat lighter character, and dyed and finished for the

retail trade. The patent therefore was essentially for dyeing and finishing cloth. Hastings' suit was supported by the Dyers' Company, who reported that if English cloth were dyed within the country the Queen would gain £10,000 annually by the increased custom. The manufacture was established at Christchurch, Hampshire, but Hastings seems to have used his grant vexatiously by wantonly molesting the Essex weavers on the ground that the manufacture of baize came within the four corners of the patent. The matter was referred by the clothiers of Coggeshall to the Exchequer, when they claimed to have gained the day (*S. P. Dom. Eliz.* vol. 106, No. 47, and Noy, 183). Subsequently an agent of Hastings was brought before the Lord Mayor's Court for trespass, and was fined £9 for molesting a weaver within the jurisdiction of the city (*S. P. Dom. Eliz.* vol. 173, No. 28). For text of the grant *see* Edmunds, *Law of Patents,* 2nd ed. p. 883.

No. XXIV. 1571. July 5. Grant to Sir Thos. Goldinge for an engine for land drainage and water supply [for 20 years].

The grant recites the condition of the lowlands and the need of a proper system of water supply for municipal and industrial purposes. The engines, once erected, will continue working without men's labour. The grant is void if the engine be not erected within two years or fails to work efficiently as set forth. The petition appears in S. P. Dom. vol. 127, under the incorrect date 1578.

No. XXV. 1571. July 30. Grant to Rd. Mathewe to make 'Turkye haftes' for knives, &c. [for 6 years].

The grantee obtained his information by residence abroad. The patent was contested successfully by the London cutlers (*Matthey's* case), apparently on the ground of 'general inconvenience' of patents of improvements in an existing trade. The text and history of the grant will be found in Edmunds, 2nd ed., p. 885.

No. XXVI. 1571. Sept. 1. Grant to Rd. Dyer to make earthen pots to hold fire for seething meat [for 7 years].

According to Howes the grantee learned the art of making 'earthen furnaces, firepots, and ovens transportable' when a

prisoner of the Spaniards (Portuguese?). The grant covers London and a three-mile radius. The industry was carried on 'at London without Moorgate,' and the patent was extended for seven years on January 28, 1579.

No. XXVII. 1573. June 13. Grant to John Payne for mills for grinding corn [for 21 years].

The grant is for modified forms of combined hand and treadmills, examples of which had already been erected at Glastonbury. The petition addressed to Burghley with 'a plat of my worke, the fyrst I ever made,' is preserved in the Lansd. MSS. Prior rights of millowners reserved. This is undoubtedly a native invention of considerable merit. As in some other cases, protection is sought in view of threatened unauthorized imitation of the invention.

No. XXVIII. 1573. July 8. Grant to John Synertson to put in practice an instrument for land drainage, and for the stopping of breaches in dams [for 10 years].

The grantee is described as of Amsterdam, stranger. Prior rights are reserved, and a term of two years assigned for introducing the industry.

No. XXIX. 1573. Oct. 28. Grant to Rd. Candish for an engine for draining coal and iron mines [for 20 years].

The grant covers all engines invented or to be invented by the grantee within this term, and extends to eight counties. Prior rights are reserved, but no term is fixed for working, owing probably to the invention being in the experimental stage.

No. XXX. 1574. April 3. License to John Collyns to make 'brode clothes called Mildernix and Polledavies' [for 21 years].

The subject of the grant is the manufacture of sailcloths, hitherto brought from France. The grant recites that the art had been introduced and apprentices educated therein, and proceeds to confine the trade to Ipswich and Woodbridge under the supervision of the patentee. On February 5, 1590, the grant was

reissued to John and Rd. Collyns for twenty-one years. Cf. also Statute 1 Jac. I, cap. 24, where the above statements are confirmed.

No. XXXI. 1574. Aug. 27. Grant to Jeremy Nenner and George Zolcher for a method of sparing fuel [for 7 years] (Latin).

The grantees are bound to erect within one year a trial installation and to prove its efficacy. The invention appears to relate to a method of domestic heating by a system of flues connected with a central furnace, and to have been adopted in practice by brewers and others (*Acts of the Privy Council*, April 27, 1578).

No. XXXII. 1574. Dec. 18. Grant to James Verselyn for making drinking glasses [for 21 years].

The grant is made on the strength of works already erected at Crutched Friars, and aimed at superseding the trade in Italian glasses. The patentee undertakes to teach the art to natives, the Crown laying stress upon the fact that "great sums of money have gone forth of our Realms for that manner of ware." Importation of foreign glass is prohibited, and the relations between the retail trade and the grantee regulated. In 1592 Verselyn surrendered the grant in favour of Sir Jerome Bowes, to whom a patent of twelve years was issued. Under this grant a rent of 100 marks is reserved to the Crown. For the further history and text of the grant cf. Antiquary, March, 1895, and Hyde Price, pp. 69, etc.

No. XXXIII. 1575. Feb. 14. Grant to Sir Thos. Smythe, the Earl of Leicester, Lord Burghley, and others of the 'Society of the New Art,' and to their successors.

Strype's Life of Smythe contains an account of this extraordinary undertaking, which was for the transmutation of iron into copper, and of lead and antimony into quicksilver. After several failures at Winchelsea, further attempts were made at Anglesea, where possibly some success was met with by the deposition of copper on iron rods laid in the copper-bearing waters of the district. The grant, or charter of incorporation, which is based on the invention of one Wm. Medley, illustrates the state of the native metallurgical science at the period.

No. XXXIV. 1577. June 8. Grant to Wm. Wade and Henry Mekyns, *alias* Pope, for making sulphur, brimstone, and oils [for 30 years].

A reissue of grant XI. Wm. Wade succeeds to the rights of the late Armigil Wade and introduces Mekyns, a London jeweller, as a capitalist prepared to spend large sums in extending the industries. By this grant it is proposed to substitute the use of vegetable oils extracted by the patentees for train or whale oil in soap-making and dressing cloth. The use of fish oil in the soap manufacture was prohibited in the following year (Acts of the Privy Council, 1578). There is a proviso that the quantities of rape and other oils made under the grant shall not be below that of the train oil entered in the London Customs' books during the last three years. With regard to the extraction of sulphur from mineral sulphides the Crown secures a rebate of one-twelfth below market prices. Note generally that this and other patents of reissue are open to objection on the ground of the 'unreasonable' extension of their term and the undue enlargement of powers conveyed in the original grant.

No. XXXV. 1578. Jan. 24. Grant to Peter Morris for engines for water-raising [for 21 years].

The text and history of this important grant will be found in the Antiquary, Aug.—Sept. 1895. The patentee was of Dutch extraction. The grant reserves prior rights and fixes three years for the introduction of the invention, which comprised the first application of the force-pump to water-raising in this country, and led almost immediately to the introduction of the manual fire engine. On the continent the application of the force-pump was well known at this period.

No. XXXVI. 1582. June 26. Grant to Rd. Spence to make white salt [for 20 years].

The patentee undertakes to introduce the industry and to supply a better salt at cheaper rates. Two years are fixed for this purpose. A rent of £10 is reserved to the Crown.

No. XXXVII. 1582. Sept. 22. Grant to Wm. Harebrowne and his son to make salt upon salt at Yarmouth [for 21 years].

The process consists of blending white Spanish salt with sea salt, and the product is applicable to fish-curing. The grantees were recommended by the Bailiffs and inhabitants of Yarmouth. The grant is made in part 'for the relief of the decayed state' of the Harebrownes' fortunes occasioned by losses at sea, and is revocable at six months' notice if found inconvenient to the town or commonweal. Importation of foreign white salt to Yarmouth forbidden.

No. XXXVIII. 1583. April 10. Grant to Geo. Langdale to make sackbuts and trumpets [for 20 years].

The patentee is described as 'one of our Trumpeters.' The grant covers all future improvements, regulates prices, and reserves the right of one Peter Grinn, 'who has heretofore mended trumpets.' The grant extends to London and a seven-mile radius.

No. XXXIX. 1584. Feb. 28. Grant to James Humfry to make train oil [for 7 years].

The grant recites that the patentee, a citizen of London, had for over twelve years practised and devised to make very good train oil from the livers of fishes imported from the north seas, and had erected houses and furnaces for the purpose. The uses of the oil are stated, and a rent of 20*s*. reserved to the Crown. The grant was reissued for ten years on May 1, 1591, to Richard Matthews, Yeoman of the Pantry; and again to his widow for twenty-one years. There can be no doubt as to the irregularity of these reissues, the first of which was opposed by the shoemakers and others of Scarborough. The industry existed for many years at Southwold.

No. XL. 1585. Sept. 1. Grant to Thos. Wilkes, Clerk of the Privy Council, to make white salt [for 21 years].

Under the original grant the industry is confined to Lynn Regis and Boston. A rent of £6 6*s*. 8*d*. is reserved and immediate prosecution of the industry insisted upon. The patent was extended on Feb. 20, 1586, to Kingston-upon-Hull. On Aug. 31, 1599, the grant was surrendered in favour of John Smithe for the remainder of the term, and a new grant was issued in consideration of the payment by the latter of two sums of £4,750 and £2,250, apparently due to the Crown by one Robert Bowes, of Berwick, deceased. In defiance of the terms of the grant,

which regulated prices by those of London (with a maximum price of 20*d.* a bushel), Smithe raised his prices to 14*s.* and 15*s.*, and was thereupon committed by the Lord President, and the old prices restored. The salt was manufactured under a sub-contract by Sir George Bruce, a colliery owner at Culross, who subsequently petitioned for a renewal of the license in 1611, offering to reduce the price of salt to 16*d.*, or 2*d.* less than the London prices, and stating that he employed over 1,000 workmen.

No. XLI. 1586. March 11. Grant to Francis Dal Arme (alien), and Robert Clarke, to work out oil of woollen cloth, with consent of the owners — 'the same oil to have for their labour' [for 21 years].

The grant insists on the instruction of any member of the public for a reasonable recompense, of which one-tenth is reserved to the Crown. Trial of the invention is to be made before the Privy Council, and the grant is void if the cloth is injured in the process of calendering.

No. XLII. 1587. Dec. 30. Grant to John Purchise, 'our subject,' to make armour and harness for man and horse [for 7 years].

The subject of the grant is a light bullet-proof fabric without any metal 'mingled or wrought in the same.' The trademark is to be a half-moon, suggestive, as in Mathewe's patent, of an Eastern origin. Probably a revival of the Saracenic defensive felt armour.

No. XLIII. 1588. April 15. Grant to Rd. Young to import, make, and sell 'le starche' [for 7 years].

The grant was reissued to Sir John Pakington for eight years on July 6, 1594, and again to the same individual on May 20, 1598. The consideration stated is the annual rent of £40, but the real consideration of the grant is the suppression of the manufacture of starch from grain — the patentee being confined 'to bran of wheat.' The grant of the trade was clearly illegal. As an instance of gross oppression by the patentee we may cite Hatfield MSS. 4, p. 261, where an individual appears to have been imprisoned by Pakington for selling starch bought under

Young's patent. Pakington appears to have undertaken to pay certain pensions to certain Dutch women whose names are connected with the introduction of starching into England (ib. p. 614).

No. XLIV. 1588. July 26. Grant to Timothy Bright, M. D., of a short and new kind of writing by character [for 15 years].

The grant is to teach, print, and publish works in shorthand. In the Lansd. MSS. there is a letter in favour of the system, with the Epistle to Titus enclosed as a specimen.

No. XLV. 1588. Dec. 4. Grant to Bevis Bulmer to make and cut iron into small pieces to work out nails [for 12 years].

There is reason to believe that the invention was of foreign origin, although it is stated that Bulmer 'is the first inventor and publisher within the realm.' Bulmer was a good mechanic and mining engineer, whose services were in demand in all parts of the kingdom.

No. XLVI. 1589. Jan. 28. Grant to George and John Evelyn and Rd. Hills to dig and get saltpetre [for 11 years].

The grant is described as 'our letters of commission for the making of saltpetre,' and is made in consideration of a great quantity of corn powder to be delivered to 'our store within the Tower.' A new grant, drawn by Coke, on Sept. 7, 1591, was made to Evelyn and others, annulling all earlier grants. The constitutional nature of the saltpetre grants was admitted by the Statute of Monopolies, but the practice was objectionable, owing to the inquisitorial powers and right of entrance upon lands conveyed by these grants.

No. XLVII. 1589. Feb. 7. Grant to John Spilman to buy all manner of linen rags, &c., to make white writing paper [for 10 years].

The grantee, an alien, held the office of Jeweller to the Queen. The grant is possibly connected with the petition of Rd. Tottyll, the Elizabethan law publisher, who in 1585 stated that the

French, by buying up all the linen rags in the kingdom, had thwarted his efforts to introduce the manufacture. The industry was established by Spilman at Dartford, where he employed over 600 workmen. The grant prohibits the manufacture of brown paper, and is void if the former manufacture be discontinued for six months. On July 15, 1597, the patent was reissued for fourteen years with the same proviso, but covering the manufacture of all kinds of paper. The text of the original grant and the petition of Tottyll will be found in Arber's Registers of the Stationers Company, i. 242, ii. 814. See also Rhys Jenkins in *Library Association Record*, Sept. — Nov. 1900.

No. XLVIII. 1589. Oct. 9. Grant to Thos. Procter, of Marske, Yorkshire, and Wm. Peterson to make iron, steel, and lead by using earth coal, sea coal, turf, or peat [for 7 years].

The consideration of the grant is the economy of fuel, of which one load would be required in place of four per ton of iron. Various small royalties are reserved to the Crown.

No. XLIX. 1590. Oct. 15. Grant to John Thorneborough, Dean of York, for the refining of pit coal [for 7 years].

The object of the invention is to overcome the popular objection to the unsavoury fumes of coal used in the imperfectly constructed hearths of the period. A royalty of 4*d.* per chaldron on the refined coal for domestic use and 8*d.* per chaldron on the exported coal is reserved, with the usual proviso in favour of users of old processes.

No. L. 1591. Nov. 4. Grant to Reynold Hoxton to make flasks for touch-boxes, powder-boxes, and bullet-boxes for small-arms [for 15 years].

Apparently a form of wooden cartridge containing powder and shot, for facilitating the loading of firearms.

No. LI. 1594. March 23. Grant to Richard Drake to make aqua composita, aqua vitae, and vinegar [for 21 years].

This grant may be regarded as typical of the Elizabethan monopoly system at its worst. It recites that about thirty years

past strangers and others had substituted beer in the manufacture of the above liquors and 'sauces'; but that of late certain covetous makers had further employed such 'corrupt, noisome, and loathsome stuff' that a reformation of the abuses was urgently required in the interests of the public health. The grant proceeds to invest in Drake the sole manufacture of the ale to be employed — such ale to be sold at London rates, with a rent of £20 per annum reserved to the Crown. Drake was further charged with the suppression of all vinegar, &c., sold in casks not bearing his own trademarks. At the last moment, 'when the grant was fully passed,' Lord Burghley intervened, and insisted upon the insertion of clauses reserving the rights of those manufacturers who employed wine lees in the manufacture, together with those of the makers of vinegar for domestic uses and charitable purposes. Wales is also excepted from the grant. The exaggerated recitals in this grant excited notice at the time; cf. Harrington, *Metamorphosis of Ajax*, and the 'Case of Monopolies.' For the abuse of the grant cf. D'Ewes *Journal*, 644, and the Lansd. and Harl. MSS.

No. LII. 1597. July 22. Grant to Thos. Lovell to inne, fence, win, drain, and recover all grounds, &c., and to make turf or peat fit to be burned [for 21 years].

The 'inventor' learned the art from the Dutch, and undertakes to introduce skilled labour from abroad.

No. LIII. 1598. April 21. Grant to Edward Wright to make and utter mathematical instruments [for 8 years].

Another water-raising device, obtained 'by long and painful study of the mathematical sciences' by the petitioner, a Cambridge Master of Arts. It is stated 'a special work' for supplying water to London had already been undertaken by the patentee. Prior rights reserved.

No. LIV. 1598. Aug. 11. Special license to Edward Darcye for transporting cards and for making them [for 21 years].

A patent for the sole importation of playing-cards had been granted (18 Eliz. p. 1) to Ralph Bowes and Thomas Bedingfield, and in 1578 John Acheley, of London, was called upon by the Privy Council to answer by what authority he presumed to

manufacture and sell playing-cards notwithstanding the above patent. Acheley replied that his doings were lawful, 'grounding himself upon the laws of the realm.' The legal points were thereupon referred to the Master of the Rolls (Sir Wm. Cordell) and the Attorney-General (? G. Gerrard), praying them to take some pains and certify their opinion, that such order may be taken as shall be agreeable with justice and equity. Their lordships, however, hint that a composition between the parties would be an acceptable termination of the dispute, as 'Acheley doth by his cardmaking set manie personnes on work which by the inhibition of his profession would otherwise be ydele.' In 1579 and 1580 further action was taken against other parties who had imitated the seal of the patentee with a view to avoid detection. In 1589, on the complaint of Bowes, the Privy Council ordered that the grants be maintained according to the contents thereof, and that hereafter infringers shall not only be taken to prison until sufficient security has been provided, but shall also have such tools, moulds, or other instruments taken away, broken in pieces and defaced. For the further history of the celebrated grant see Gordon, *Monopolies by Patents*.

No. LV. 1599. July 11. Grant to Capt. Thos. Hayes for making of instruments of war [for 10 years].

Various military inventions and accoutrements to enable soldiers to perform the work of 'Pyoners.' There is a proviso that the requirements of the Crown shall be supplied. In 1604 the patentee notified his intention to present the above invention to the Crown, offering the master of the Ordnance £2,000 if he could get the portsack introduced into the southern counties.

The results of the industrial policy of the Elizabethan reign may now be presented in tabular form:—

Period	Alien Grants	Native Grants	Grants for regulating Trade	Total
1561–1570	15	8	0	23
1571–1580	4	7	1	12
1581–1590	2	11	1	14
1591–1600	0	4	2	6
1601–1603	0	0	0	0
1561–1603	21	30	4	55

The first column of our classification comprises grants for new industries and inventions to aliens or naturalized subjects of the Crown. With these we find occasionally associated a native, acting as interpreter and intermediary between the foreigner and the public. The figures for the period 1571-90 indicate the development of native enterprise, although the industries still bear the impress of foreign suggestion. The Statistics for 1591-1603, which indicate a practical reversal of the favourable attitude of the Crown toward the inventor, afford a fair criterion of the industrial value of the Elizabethan patent system. During this period we have to record the rejection of the suits for protection of the following inventions: — (*a*) The stocking frame of Lee — the most original invention of the age, which for lack of encouragement went to France, where the inventor is stated to have received a privilege; (*b*) the water-closet of Harington, which was reintroduced about a century and a half later; (*c*) a scheme of Gianibelli for land reclamation; (*d*) various devices of the ingenious Hugh Platt, in part of foreign origin; (*e*) Stanley's invention of armour plates; and (*f*) a scheme for sugar-refining, the novelty, however, of which was questioned.

True and First Inventor. An attempt to further illustrate the growth of the native inventive talent by subdividing the above figures into grants of importation and invention proved impracticable owing to the want of definition in the phraseology descriptive of the relation of the patentee to the subject of the grant. In the 16th Cent. the meaning of the verb 'to invent' and its derivatives was not confined to its modern signification. For instance in the translation of the well known work of Polydore Vergil *De inventoribus rerum*, under a chapter headed 'Who found out Metals' we are told that 'Eacus invented it [i. e. gold] in Panchaia,' and again that the Justinians, a religious order, were 'invented' [i. e. founded] by Lewis Barbus. This view has since been confirmed by the 'Oxford English Dictionary,' which has assigned to the verb 'invent' two meanings now obsolete (*a*) to discover — a meaning still preserved in the phrase 'the invention of the Cross,' (*b*) 'to originate, to bring into use for-

mally or by authority, to found, establish, institute or appoint.' Before attempting, however, to assign a definite equivalent of the 'the true and first inventor' of the Statute of Monopolies the results of an examination of the phraseology of the patent grants and legal decisions prior to the Statute must be given. Briefly, on the Patent Rolls the words are found in all these meanings: but when used in the modern sense they are generally preceded or supported by another less equivocal term or phrase, e. g. 'invented and devised' 'devise and invention.' Frequently a different terminology is selected, e. g. 'first finders out and searchers' 'first deviser and maker.' Again 'invention' is often asserted in the later clauses of the patent grant where no claim to invention is made in the recitals of the grant (Cf. Patents No. ii, xxxv, xlv, lii). Here 'invention' must be translated as 'new art,' for as invention was not required to support a patent the patentee had no object in laying claim to it, whilst a false recital was fatal to the validity of a patent.

Turning from the Patent Rolls to the judicial decisions, in *Darcy* v. *Allen*, 'invention' is used in its modern sense preceded by another word, viz. 'wit and invention'; but in the *Clothworkers of Ipswich* case (1615) the phrase 'invention and a new trade' is actually used to distinguish an imported process from 'invention,' i. e. the result of the exercise of the inventive faculty. 'If a man hath brought in a new invention and a new trade . . . in peril of his life or consumption of his estate, or if a man hath made a new discovery of anything, in such cases, etc.' Again, 'Of a new invention the King can grant a patent' but 'where there is no invention the King cannot by his patent hinder any trade.' Here the Court is dealing with the amount of difference required to support a patent, not with the source from which the patented process is derived. The following reasons, therefore, may be given for attributing to the phrase 'true and first inventor' the meaning 'true and first originator, founder or institutor' of the new manufactures, viz.:

(a) The meaning is consistent with contemporary usage.

(b) It maintains complete conformity between the judicial decisions and the Statute which is professedly declaratory of

those decisions, as to the description of the two parties who could qualify for the grant; while it retains in the Statute a declaration of the express 'consideration' of the grants which is otherwise wanting. The suggested interpretation, it will be observed, specifies neither the inventor nor the importer directly, but includes both.

(c) If any preference had been intended between the importer and inventor, the former would have been favoured, for the introduction of new foreign industries was less likely to prove inconvenient than improvements on existing ones (Cf. D'Ewes' *Journal*, 678).

(d) If the Statute had proposed to favour the inventor as against the importer the party denoted would have been described with greater precision, and some 'consideration' would have been exacted by limiting a term for the introduction of the industry or by requiring some form of disclosure of the invention.

It will be readily understood how the meaning of invention became associated with the idea of experimental effort as distinguished from the practical institution of a new art. In the natural order of things patents of invention succeeded to patents of importation as the base of national industry was broadened and as its level was gradually raised to that of the Continent. Yarranton's complaint in 1677 (Law Quart. Review July 1902) could hardly have been penned if the word had then retained its original signification. The practice of the Crown with respect to patents of importation was supported indeed by Edgebury *v.* Stephens (1691) on the ground that the source of an invention is immaterial, 'whether learned by study or travel it is the same thing,' but the light which once illuminated the word 'inventor' had faded, and henceforward the practice of the Crown has been treated as 'an anomaly which has acquired by time and recognition the force of law (*Edmunds* 2nd ed. pp. 266-67), but for which no statutory authority is forthcoming.'

Disclosure of invention. Hindmarch, one of the greatest writers on English Patent Law, once expressed a doubt whether the patentee was ever under an obligation to work his grant at all. The same writer in his chapter on the patent

specification asserted that a grant was bad in law which contained no technical description in the recitals of the patent, or in respect of which no specification was required to be filed. Both statements however are directly opposed to the evidence of the Patent Rolls.

That disclosure was not required prior to the middle of the eighteenth century may be gathered from the final clause in the Letters Patent which ran that the grant should be favorably construed by the Courts 'notwithstanding the not full and certain describing the nature and quality of the said invention or of the materials thereunto conducing and belonging.' This clause, although not peculiar to Letters Patent for inventions, could hardly have been introduced, if at the date of its introduction written or printed disclosure of the invention had been required of the patentee. The attitude of the Crown toward disclosure may be gathered from the three following typical cases: (A) The first known patent specification relates to the saltpetre patent of 1561. Here the original proposal was that the Crown should manufacture on its own account, and a sum of money was to be paid by the Queen in return for the disclosure of the new art and the personal services of the introducer. Subsequently the bargain was transferred to two London tradesmen who took over the Crown's liability in consideration of the monopoly. (B) In 1611 Simon Sturtevant, on his own initiative and probably with a fraudulent motive, filed with his petition what he called a '*Treatise of Metallica*' which treatise he covenanted to supplement by a fuller statement to be printed and published within a given term after the letters patent. This anticipation of the system of provisional and complete specification is in itself sufficiently curious. But in his final treatise Sturtevant lays down with great clearness the modern doctrine of the patent specification, adding that 'he was not tied to any time in the trial of his invention.' He was speedily undeceived, for in the following year the patent was cancelled on the ground of his outlawry and *neglect to work the patent.* (C) A century later, 1711, we have the case of Nasmith's patent from which we quote the following extract:

PATENT ROLL, 10 ANNE. PART 2.

'Anne, &c., Whereas John Nasmith of Hamelton in North Britain, apothecary, has by his petition represented to us that he has at great expense found out a new Invention for preparing and fermenting wash from sugar "Molosses" and all sorts of grain to be distilled which will greatly increase our revenues when put in practice *which he alleges he is ready to do* "but that he thinks it not safe to mencon in what the New Invention consists untill he shall have obtained our Letters Patents for the same. But *has proposed* to ascertain the same in writeing under his hand and seale to be Inrolled in our high Court of Chancery within a reasonable time after the passing of these our Letters Patents," &c.'

From these cases we may deduce the origin of the specification, viz. that the practice arose at the suggestion, and for the benefit, of the grantee with the view of making the grant more certain, and not primarily as constituting the full disclosure of the invention now required at law for the instruction of the public.

This theory harmonizes with what is known of the practice of the sixteenth and seventeenth centuries. So long as the monopoly system aimed at the introduction of new industries such as copper, lead, gold, and silver mining, or the manufacture of glass, paper, alum, &c., &c., the requisition of a full description would have required a treatise rather than a specification, and would have materially detracted from the concession offered by the Crown, besides constituting a precedent for which no sufficient reason or authority could have been adduced. But when, by a natural development, the system began to be utilized by inventors working more or less on the same lines for the same objects, the latter for their own protection draughted their applications with a view of distinguishing their processes from those of their immediate predecessors, and of ensuring priority against all subsequent applicants. Hence, while the recitals of the sixteenth century deal almost exclusively with suggestions of the advantages which would accrue to the State from the possession of certain industries, or with statements respect-

ing steps taken by the applicants to qualify themselves for the monopoly, those of a later date not infrequently deal with the technical nature of the proposed improvement. These recitals, therefore, while forming no part of the consideration of the grant, are undoubtedly the precursors of the modern patent specification. Between 1711 and 1730 the wording of the proviso (when the latter appears among the general covenants of the grant) distinctly recognizes the proposal as emanating from the applicant — 'whereas *A* did propose to ascertain under his hand and seal, &c., &c.;' but about the year 1730 the form of a proviso voiding the grant in case of the non-filing of a specification was substituted. Still the practice of requiring a specification cannot be said to have been established prior to the middle of the eighteenth century.

The first judicial pronouncement as to the position which the patent specification has since occupied in English patent law must be claimed for Lord Mansfield, though the exact date of his Lordship's dictum cannot at present be stated. The following quotation, establishing the fact, is taken from the summing up of Lord Mansfield in Liardet *v.* Johnson (1778), a case supposed to have been unreported. There is some reason to think that the pamphlet containing the account of the trial was suppressed shortly after its publication (Cf. Law Quart. Review, July 1902). Lord Mansfield's words are as follows:

'The third point is whether the specification is such as instructs others to make it. For the condition of giving encouragement is this: that you must specify upon record your invention in such a way as shall teach an artist, when your term is out, to make it — and to make it as well as you by your directions; for then at the end of the term, the public have the benefit of it. The inventor has the benefit during the term, and the public have the benefit after. But if, as Dr. James did with his powders, the specification of the composition gives no proportions, there is an end of his patent, and when he is dead, nobody is a bit the wiser; the materials were all old — antimony is old, and all the other ingredients. If no proportion is specified, you are not, I say, a bit the

wiser; and, *therefore, I have determined, in several cases here,* the specification must state, where there is a composition, the proportions; so that any other artist may be able to make it, and it must be a lesson and direction to him by which to make it. If the invention be of another sort, to be done by mechanism, they must describe it in a way that an artist must be able to do it.'

Novelty. The statutory definition of novelty is precise. It confines future grants 'to the sole working and making of new manufactures . . . which others at the time of making such letters patent and grant shall not use. The statutory limitation reappears in the clause in the letters patent which avoids the grant on proof that the said invention 'is not a new manufacture as to the public use and exercise thereof.' Modern commentators, however, jump to the conclusion that under the Statute 'there must be novelty.' But manifestly a proper deduction from the clause is that want of novelty could not be raised as a separate issue apart from prior user. Neither in *Bircot's* case or in Coke's commentary do we find any trace of the doctrine that proof of prior publication would avoid a patent. Yarranton (Law Quart. Review, July 1902) who states the case against patents more strongly even than Coke is also silent as to this defeasance. Novelty according to these writers is limited to a comparison with the corresponding art within the realm, but within this limited area absolute distinction may be required to be shown. By a curious coincidence this interpretation of the Statute is to be found in Liardet *v.* Johnson, the case already referred to as having by its enunciation of the doctrine of the patent specification substantially relaid the foundations of the law of patents.

'The other extreme,' said Lord Mansfield, 'is the suffering men to get monopolies of what is in use and in the trade at the time they apply for letters patent, and therefore the Statute of King James expressly qualifies it. That it must be of such invention (*sic*) as are not then used by others.' Again 'An invention must be something in the trade and followed and pursued;' 'whether it was in books or receipts it never prevailed in practice or in the trade.'

The modern view of the law of Novelty was unsuccessfully urged, it should be noted, by the defendants' counsel, but in this trial the learned judge would appear not to have realised, or to have been unwilling to apply the results which flowed naturally from his previous dicta. If disclosure was the sole obligation laid upon the inventor by the grant, proof of prior disclosure must render the patent invalid for want of consideration.

Utility. The statute does not in terms mention utility (Edmunds. 2nd ed. p. 100: Frost 2nd ed. 139) and the chapter on utility in the textbooks is generally vague and unsatisfactory. Utility, of course, is implied in the phrase 'new manufactures . . . to the true and first inventors thereof,' for the introduction of a new art on a commercial scale cannot take place unless the product serves some useful purpose. Arts, the exercise of which are 'contrary to law, or mischievous to the State or generally inconvenient' are separately provided for.

Jurisdiction. In a recent Government paper on the working of the Patent Acts [Cd 906] the origin and exercise of the powers committed to the Privy Council with respect to the revocation of patents on the ground of inconvenience is dealt with at some length. Under the Stuarts a clause was also inserted directing the patentee in case of resistance to the grant to certify the same to the Court of Exchequer. Later on the King's Bench or Privy Council are substituted: but finally the Crown was content to threaten the utmost rigour of the law in case of contempt of this 'Our Royal Command,' without specifying where relief was to be obtained. The whole question of the jurisdiction of the patent grants in the 17th Century requires further research; but there are grounds for thinking that as a rule this jurisdiction was exercised by the Privy Council down to the middle of the 18th Century. The point is of great importance in explaining the want of continuity between the Statute of Monopolies and the decisions under the Statute in the latter half of the 18th Cent. It is clear that at this period the Courts were without precedents to guide them, for the Privy Council was an executive body, and not a legally qualified

tribunal. The following case of revocation of a patent by the Privy Council in the year 1745, acting under the powers reserved to it by the above clause in the letters patent will go far to confirm this view. In this year an order vacating Betton's patent for making British oil was made at a meeting of the Council, at which were present the King, the Archbishop of Canterbury, and other dignitaries. The order states that a petition for revocation had been presented by two makers and dealers in a similar oil, that the matter had been referred to the Law Officers, who reported that the petitioners had made good their case and that they were of opinion that the letters patent should be made void. Whereupon the Lords of the Committee of the Privy Council agreeing with the opinion of the Law Officers, the King was pleased to order that the patent should be made void, and an order to this effect was therefore signed by 7 of the Privy Councillors present.

54. THE HISTORY OF THE CARRIER'S LIABILITY[1]

By Joseph Henry Beale, Jr.[2]

THE extraordinary liability of the common carrier of goods is an anomaly in our law. It is currently called "insurer's liability," but it has nothing in common with the voluntary obligation of the insurer, undertaken in consideration of a premium proportioned to the risk. Several attempts have been made to explain it upon historical grounds, the most elaborate that of Mr. Justice Holmes.[3] His explanation is so learned, ingenious, and generally convincing, that it is proper to point out wherein it is believed to fall short.

His argument is in short this. In the early law goods bailed were absolutely at the risk of the bailee. This was held in Southcote's Case,[4] and prevailed long after. The ordinary action to recover against a bailee was detinue. But as that gradually fell out of use in the seventeenth century its place was necessarily taken by case; and in order that case might lie for a nonfeasance, some duty must be shown. There were two ways of alleging a duty: by a *super se assumpsit*, and by stating that the defendant was engaged in a common occupation. It was usual to include an allegation of negligence, from abundant caution, but that was

[1] This Essay was first printed in the Harvard Law Review, 1897, vol. XI, pp. 158-168.

[2] A biographical sketch of this author will be found prefixed to Essay No. 17, Vol. I of this Collection.

[3] The Common Law, Lecture V.

[4] 4 Co. 83 b; Cro. Eliz. 815. A fuller and better report than either of these is in a manuscript report in the Harvard Law Library, 42-45 Eliz. 109 b.

"mere form." Chief Justice Holt[1] finally overthrew the doctrine of the bailee's absolute liability, except where there was a common occupation, or (of course) where there was an express assumpsit. The extraordinary liability of a carrier is therefore a survival of a doctrine once common to all bailments.

Judge Holmes does not explain satisfactorily why this doctrine should not have survived in the case even of all common occupations, but only in the case of the common carrier of goods; nor does he account for the fact that the carrier is held absolutely liable, not merely, like the bailee once, for the loss of goods, but, unlike that bailee, for injury to them. The difficulties were not neglected from inadvertence, for he mentions them.[2] But without laboring these points, his main proposition should be carefully considered. Is it true that the bailee was once absolutely liable for goods taken from him? It may be so; Pollock and Maitland seem to give a hesitating recognition to the doctrine,[3] but the evidence is not quite convincing.[4]

[1] In Lane *v.* Cotton, 12 Mod. 472, and Coggs *v.* Bernard, 2 Ld. Raym. 909; *obiter* in both cases.

[2] Page 199.

[3] Hist. Eng. Law, 169.

[4] [It is however certain that the Germanic common law of the Norman Conquest period did make bailees for hire, of all sorts (including innkeepers, pledgees, and carriers), responsible absolutely for the goods delivered, even when lost by theft, and regardless of negligence; *e. g.* Loersch, Aachener Rechtsdenkmäler aus den 13o, 14o, 15o Jahrhunderten, 1871, p. 115, Art. 63: "Weirt sache dat eyn gast geve synen vert zo halden gelt, golt, silver off ander have, ind dan *deme werde dat gestolen worde,* ind neyt van synen gude, dat were he *schuldich deme gast* zo richten"; Sachsenspiegel, II, 60, § 1: "Svelk man enen anderen *liet oder sat* perde oder en kleid oder ienegerhande varende have, to svelker wis he die ut sinen geweren let mit sime willen, verkoft sie die, die sie in geweren hevet, oder versat he sie, oder verspelet he sie, oder wert sie ime *verstolen* oder *afgerovet,* jene die sie verlegen oder versat hevet, die *ne* mach dar *nene* vorderunge up hebben, *ane uppe den* deme he sie leich oder versatte;" so also ib. III, 5; 4. This rule was inseparable from the notion of *gewere,* or seisin, and from the corresponding action of the bailee against the thief and the lack of action by the bailor against the thief, — a connection expressly mentioned in the Year Book cases cited *post,* p. 152, note 4, and fully expounded by the historians of Germanic law: Heusler, Institutionen des deutschen Rechts, 1885-6, I, 390-96, II, 191, 203, 212; Brunner, Deutsche Rechtsgeschichte, 1892, II, 509, 510; Jobbé-Duval, La revendication des meubles en droit français, in Nouv. revue hist. de droit fr. et étranger, IV, 1880, p. 463, at p. 475, note 1 (Laband, Vermögensrechtliche Klagen, 1869, p. 67, is explainable otherwise). This being so (and the presumption being that

No one versed in English legal history will deny that the bailee of goods was the representative of them, and the bailor's only right was in the proper case to require a return; and therefore that when a return was required it was incumbent upon the bailee to account. Nor can it be doubted that the law then tended to lay stress on facts rather than reasons, — to hang the man who had killed another rather than hear his excuse. We should therefore not be surprised, on the one hand, to find that, where one had obliged himself to return a chattel, no excuse would be allowed for a failure to return. On the other hand, by the machinery of warranty, it was always possible to explain away the possession of an undesirable chattel; why not to explain the non-possession of a desired one? We should therefore not be greatly surprised if the authorities allowed some explanation.

Three actions were allowed a bailor against a bailee: detinue, account, and (after the Statute of Westminster) case. Let us see whether in either of these actions the defendant was held without the possibility of excuse.

Case lies only for a tort; either an active misfeasance, or, in later times, a negligent omission. There must therefore be at the least negligence; and so are the authorities. The earliest recorded action against a carrier is case against a boatman for overloading his boat so that plaintiff's mare was lost; it was objected that the action would not lie, because no tort was supposed; the court answered that the overloading was a tort.[1] So in an action on the case for negligently suffering plaintiff's lambs, bailed to defendant, to perish, it was argued that the negligence gave occasion for an action of tort.[2] So later, in the case of an agister of cattle, the negligence was held to support an action on the

the Anglo-Norman rule of the same period shared this fundamental idea), it is obvious that the conflict of precedents in England between the 1200s and the 1500s (as shown in this Essay) is more naturally explained as a growing effort to cut down an originally absolute liability than as an effort to increase an originally limited liability. In other words, Mr. Justice Holmes' explanation fits perfectly with the tenor of the primitive law, while the learned Essayist's explanation does not fit at all. — Eds.]

[1] 22 Ass. 41 (1348).

[2] 2 H. 7, 11, pl. 9 (1487).

case.[1] In these cases the action would not lie except for the negligence.[2] In the case of ordinary bailments, therefore, negligence of the bailee must be alleged and proved to support an action on the case against him. I shall hereafter consider actions on the case against those pursuing a common occupation.

In the action of account there is hardly a doubt that robbery without fault of bailee could be pleaded in discharge before the auditors.[3] To the contrary is only a single dictum of Danby, C. J., and there the form of action is perhaps doubtful.[4] Indeed, in Southcote's Case the court admitted that the factor would be discharged before the auditors in such a case, and drew a distinction between factor and innkeeper or carrier.

In the action of detinue then, if anywhere, we shall find the bailee held strictly; and the authorities must be examined carefully.

The earliest authority is a roll where, in detinue for charters, the bailee tendered the charters *minus* the seals, which had been cut off and carried away by robbers. On demurrer this was held a good defence.[5] The next case was detinue for a locked chest with chattels. The defence was that the chattels were delivered to defendant locked in the chest, and that thieves carried away the chest and chattels along with the defendant's goods. The plaintiff was driven to take issue on the allegation that the goods were carried away by thieves.[6] A few years later, counsel said without dispute

[1] Moo. 543 (1598).

[2] The *assumpsit* is also mentioned in them; but this means, not a contract that they shall be safe, but an undertaking to perform a certain purpose. Holt, C. J., in Coggs *v.* Bernard, 2 Ld. Raym. 909, 919.

[3] Fitz. Accompt, pl. 111 (1348); 41 E. 3, 3 (1367); 2 R. 3, 14 (1478); Vere *v.* Smith, 1 Vent. 121 (1661).

[4] 9 E. 4, 40 (1469). In an action of account, the court held that robbery could not be pleaded in bar, but if it was an excuse it must be pleaded before the auditor. Danby's remark, that robbery excuses a bailee only if he takes the goods to keep as his own, has no reference to the action itself. Brooke abridges the case under *Detinue*, 27.

[5] Brinkburn Chartulary, p. 105 (1299).

[6] Fitz., Detinue, 59 (1315). According to Southcote's Case and Judge Holmes (Com. Law, p. 176), Fitzherbert states the issue to have been that the goods were delivered outside the chest. Neither the first (1516) edition of Fitzherbert, nor others (1565, 1577) to which I have access, are so. In the printed book (8 E. 2, 275) it is indeed laid down as

that if goods bailed were burned with the house they were in, it would be an answer in detinue.[1] Then where goods were pledged and put with the defendant's own goods, and all were stolen, that was held a defence; the plaintiff was obliged to avoid the bar by alleging a tender before the theft.[2] Finally in 1432, the court (Cotesmore, J.) said: "If I give goods to a man to keep to my use, if the goods by his misguard are stolen, he shall be charged to me for said goods; but if he be robbed of said goods it is excusable by the law."[3]

At last, in the second half of the fifteenth century, we get the first reported dissent from this doctrine. In several cases it was said, usually *obiter*, that if goods are carried away (or stolen) from a bailee he shall have an action, because he is charged over to the bailor.[4]

In several later cases the old rule was again applied, and the bailee discharged.[5] There seems to be no actual decision holding an ordinary bailee responsible for goods robbed until Southcote's Case.[6]

Gawdy and Holmes state it; we have therefore a choice of texts. It is common knowledge that Maynard's text is often corrupt; it is a century and a half further from the original; and in this case the inaccuracy is manifest. The text throughout has to be corrected by comparison with Fitzherbert in order to make it sensible. From internal evidence Fitzherbert's text must be chosen. It would be interesting to have a transcript of the roll.

[1] 12 & 13 E. 3, 244 (1339).

[2] 29 Ass. 163, pl. 28 (1355). Judge Holmes, following the artificial reasoning of Gawdy (or Coke?) says the pledge was a special bailment to keep as one's own. The reason stated by Coke is exactly opposed to that upon which Judge Holmes's own theory is based; it is that a pledgee undertakes only to keep as his own because he has "a property in them, and not a custody only," like other bailees. The court in the principal case knows nothing of this refinement. "For W. Thorpe, B., said that if one bails me his goods to keep, and I put them with mine and they are stolen, I shall not be charged." After refusal of tender, defendant would have been, not, as Judge Holmes says, a general bailee, but a tortious bailee, and therefore accountable. The refusal was the detinue, or as the court said in Southcote's Case, "There is fault in him."

[3] 10 H. 6, 21, pl. 69.

[4] 2 E. 4, 15, pl. 7, by Littleton (1462); 9 E. 4, 34, pl. 9, by Littleton and Brian, JJ (1469); 9 E. 4, 40, pl. 22 (1469), by Danby, C. J. (*ante*); 6 H. 7, 12, pl. 9, per Fineux, J. (1491); 10 H. 7, 26, pl. 3; per Fineux, J. (1495). In the last two cases, Keble, *arguendo*, had stated the opposite view; and Brooke (Detinue, 37) by a query appears rather to approve Keble's contention.

[5] 1 Harvard MS. Rep. 3a (1589, stated later), *semble;* Woodlife's Case, Moo. 462 (1597); Mosley *v.* Fosset, Moo. 543 (1598), *semble.*

[6] 4 Coke, 83 b, Cro. Eliz. 815; Harv. MS. Rep. 42-45 Eliz. 109 b (1600).

This was detinue for certain goods delivered to the defendant "to keep safe." Plea, admitting the bailment alleged, that J. S. stole them out of his possession. Replication, that J. S. was defendant's servant retained in his service. Demurrer, and judgment for the plaintiff.

The case was decided by Gawdy and Clench, in the absence of Popham and Fenner; and it is curious that Gawdy and Clench had differed from the two others as to the degree of liability of a bailee in previous cases.[1] It would seem that judgment might have been given for plaintiff on the replication; the court, however, preferred to give it on the plea. This really rested on the form of the declaration; a promise to keep safely, which, as the court said, is broken if the goods come to harm. The only authority cited for the decision was the Marshal's Case, which I shall presently examine and show to rest on a different ground. The rest of Coke's report of the case (of which nothing is said in the other reports) is an artificial and, *pace* Judge Holmes, quite unsuccessful attempt to reconcile, in accordance with the decision, the differing earlier opinions. The case has probably been given more authority than it really should have. At the end of the manuscript report cited we have these words: "Wherefore they (*cæteris absentibus*) give judgment for the plaintiff *nisi aliquod dicatur in contrario die veneris proximo*." And it would seem that judgment was finally given by the whole court for the defendant. In the third edition of Lord Raymond's Reports is this note: "That notion in Southcote's Case, that a general bailment and a bailment to be safely kept is all one, was denied to be law by the whole court, *ex relatione Magistri Bunbury*."[2] It was not uncommon for a case to be left half reported by the omission of a *residuum;* and it may be that Southcote's Case as printed is a false report. One would be glad to see the record.

Southcote's Case is said to have been followed for a hundred years. The statement does it too much honor. It seems to be the last reported action of detinue where the excuse of loss by theft was set up; and, as has been seen, the principle

[1] Woodlife's Case, Moo. 462; Mosley *v.* Fosset, Moo. 543.
[2] 2 Ld. Raym. 911 *n.*

it tries to establish does not apply to other forms of action. It was cited in several reported actions on the case against carriers, but seems never to have been the basis of decision; on the other hand, in Williams *v.* Lloyd,[1] where it was cited by counsel, a general bailee who had lost the goods by robbery was discharged. The action was upon the case.

Having thus briefly explained why Judge Holmes's theory of the carrier's liability is not entirely satisfactory, I may now suggest certain modifications of it. I believe, with him, that the modern liability is an ignorant extension of a much narrower earlier liability;[2] but the extension was not completed, I think, for eighty years after the date he fixes, and the mistaken judge was not Lord Holt, but Lord Mansfield.

From the earliest times certain tradesmen and artificers were treated in an exceptional way, on the ground that they were engaged in a "common" or public occupation; and for a similar reason public officials were subjected to the same exceptional treatment. Such persons were innkeepers,[3] victuallers, taverners, smiths,[4] farriers,[5] tailors,[6] carriers,[7] ferrymen, sheriffs,[8] and gaolers.[9] Each of these persons, having undertaken the common employment, was not only at the service of the public, but was bound so to carry on his employment as to avoid losses by unskilfulness or improper preparation for the business. In the language of Fitzherbert, "If a smith prick my horse with a nail, I shall have my action on the case against him without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."[10] By undertaking the special duty he warrants his special preparation for it. The action is almost invariably on the case.

One of the earliest cases in the books was against an inn-

[1] Palmer, 548; W. Jones, 179 (1628).
[2] See The Common Law, pp. 199, 200.
[3] 11 H. 4, 45, pl. 8; 22 H. 6, 21, pl. 38; ib. 38, pl. 8.
[4] 46 E. 3, 19.
[5] Often called "common marshal." 19 H. 6, 49, pl. 5.
[6] 1 Harv. MS. Rep. 3a.
[7] These were "country" carriers; the term did not at first include carriers by water.
[8] 41 Ass. 12.
[9] 33 H. 6, 1, pl. 3.
[10] F. N. B. 94 d.

keeper, stating the custom of England for landlords and their servants to guard goods within the inn; it was alleged that while plaintiff was lodged in the inn his goods were stolen from it. There was no allegation of fault in the defendant, and on this ground he demurred; but he was held liable notwithstanding. The plaintiff prayed for a *capias ad satisfaciendum*. Knivet, J. replied, that this would not be right, since there was no tort supposed, and he was charged by the law, and not because of his fault; it was like the case of suit against the hundred by one robbed within it; he ought not to be imprisoned. The plaintiff was forced to be content with an *elegit* on his lands.[1] A few years later a smith was sued for "nailing" the plaintiff's horse; the defendant objected that it was not alleged *vi et armis* or *malitiose*, but the objection was overruled, and it was held that the mere fact of nailing the horse showed a cause of action.[2] An action was brought against a sheriff for non-return of a writ into court; he answered that he gave the writ to his coroner, who was robbed by one named in the exigent. He was held liable notwithstanding, Knivet, J. saying, "What you allege was your own default, since the duty to guard was yours."[3]

In 1410, in an action against an innkeeper, Hankford, J. used similar language: "If he suffers one to lodge with him he answers for his goods; and he is bound to have deputies and servants under him, for well keeping the inn during his absence."[4] A noteworthy remark was Judge Paston's a few years later: "You do not allege that he is a common marshal to cure such a horse; and if not, though he killed your horse by his medicines, still you shall not have an action against him without a promise."[5] Soon after was decided the great case of the Marshal of the King's Bench.[6] This was debt on a statute against the Marshal for an escape. The pris-

[1] 42 E. 3, 11, pl. 13 (1367). In 43 E. 3, 33, pl. 38, it was alleged that a "marshal" had undertaken to cure a horse, but had proceeded so negligently that the horse died. The defendant was driven from a denial of the undertaking, and was obliged to traverse the defect of care.
[2] 46 E. 3, 19, pl. 19 (1371).
[3] 41 Ass. 254, pl. 12 (1366).
[4] 11 H. 4, 45, pl. 18 (1410).
[5] 19 H. 6, 49, pl. 5 (1441).
[6] 33 H. 6, 1, pl. 3 (1455).

oner had been liberated by a mob; the defendant was held liable. The reason was somewhat differently stated by two of the judges. Danby, J. said that the defendant was liable because he had his remedy over. Prisot, C. J. put the recovery on the ground of negligent guard. This case was frequently cited in actions against carriers; but not, I think, in actions against ordinary bailees before Southcote's Case.

The earliest statement of the liability of a common carrier occurs, I think, in the Doctor and Student (1518), where it is said that, "if a common carrier go by the ways that be dangerous for robbing, or drive by night, or in other inconvenient time, and be robbed; or if he overcharge a horse whereby he falleth into the water, or otherwise, so that the stuff is hurt or impaired; that he shall stand charged for his misdeameanor."[1] In the time of Elizabeth, the hire paid to the carrier was alleged as the reason for his extraordinary liability.[2] Finally, in Morse *v.* Slue[3] the court "agreed the master shall not answer for inevitable damage, nor the owners neither without special undertaking: when it's *vis cui*

[1] Doctor and Student, c. 38. A little later is found this curious case, Dall. 8 (1553). "Note by Browne, J., and Portman, J., as clear law; if a common carrier takes a pack of stuff from a man to carry it to D. and while in a common inn the pack is taken and stolen, the owner for this shall have an action against the innkeeper for the stuff and the carrier shall not; for they are not the goods of the carrier, nor shall he be charged with them inasmuch as he was by law compellable to carry them; and it is not like where one takes goods to carry generally, for if he be robbed, it shall be charged to the carrier for his general taking, to which he was not compellable, and so he shall have action over in respect of his liability." This is the only hint at a less liability of the common carrier than of the private carrier. It is interesting to notice that it was regarded as the duty of the innkeeper, and not of the carrier, to guard the goods in the inn. The duty is imposed by law for a purpose; that purpose is served by putting the duty on the innkeeper here; the law need not require a double service.

[2] "It was held by all the Justices in the Queen's Bench, that if a man bail certain cloths to a tailor to make a robe of them, who does so, and then it is stolen out of his shop, still he shall be accountable for it; the same is law of a carrier who has anything for his labor. But it is otherwise of him who has nothing for keeping it, but keeps it of his good will." 1 Harv. MS. Rep. 3a. To the same effect is Woodlife's Case, as reported in 1 Rolle's Abridgment, 2, as follows: "If a man deliver goods to a common carrier to carry, and the carrier is robbed of them, still he shall be charged with them, because he had hire for them, and so implicitly took upon him the safe delivery of the goods; and therefore he shall answer for the value of them if he be robbed."

[3] 3 Keb. 135 (1672).

resisti non potest; but for robbery the usual number to guide the ship must be increased as the charge increaseth."

Thus stood the law of carriers and of others in a common employment down to the decision in Coggs *v.* Bernard.[1] Two or three things should be noted. First, carriers are on the same footing with many other persons in a common employment, some bailees and some not, but all subjected to a similar liability, depending upon their common employment; and there is no evidence in the case of these persons of anything approaching a warranty against all kinds of loss. The duty of the undertaker was to guard against some special kind of loss only. Thus the gaoler warranted against a breaking of the gaol, but not against fire; the smith warranted against pricking the horse; the innkeeper against theft, but not against other sorts of injury;[2] the carrier against theft on the road, but probably not against theft at an inn.

Secondly. This is put on different grounds; but all may be reduced to two. On the one hand, it may be conceived that the defendant has undertaken to perform a certain act which he is therefore held to do: either because the law forces him into the undertaking (as a hundred is forced to answer a robbery), or, as seems to have been in Judge Paston's mind, because there was some consent which took the place of a covenant. On the other hand, it may be conceived that the defendant has so invited the public to trust him that certain avoidable mischances should be charged to his negligence; he ought to have guarded against them. "The duty to guard" is the sheriff's or the carrier's or the innkeeper's; he is bound to have deputies for well keeping the inn; if a mob breaks in he shall be charged for his negligent guard; the usual number must be increased as the charge increases; if he go by the ways that be dangerous, or at an inconvenient time, he shall stand charged for his misdemeanor. It is to be remembered that during this time case on a *super se assumpsit* had this same doubtful aspect; to use a modern phrase, it was even harder then than now to tell whether such an action sounded in contract or in tort. The test of payment for

[1] 2 Ld. Raym. 909 (1703).
[2] Dawson *v.* Chamney, 5 Q. B. 164.

services is a loose and soon abandoned method of ascertaining whether the defendant was a private undertaker or in a common employment.[1]

Another thing important to notice is that all precedents of declarations against a carrier or an innkeeper allege negligence.[2] It is of course impossible to prove that this did not become a mere form before rather than after Lord Holt's time; but it is on the whole probable that it originally had a necessary place.

We have now brought the development of the law to the great case of Coggs *v.* Bernard.[3] This was an action against a gratuitous carrier, and everything said by the court about common carriers was therefore *obiter*. Three of the judges did, however, treat the matter somewhat elaborately. Gould, J. put the liability squarely on the ground of negligence: "The reason of the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect. . . . When a man undertakes specially to do such a thing, it is not hard to charge him for his neglect, because he had the goods committed to his custody upon those terms." Powys, J. "agreed upon the neglect." Powell, J. emphasized the other view, that "the gist of these actions is the undertaking. . . . The bailee in this case shall answer accidents, as if the goods are stolen; but not such accidents and casualties as happen by the act of God, as fire, tempest, &c. So it is in 1 Jones, 179; Palm. 548. For the bailee is not bound upon any undertaking against the act of God." Holt, C. J. seized the occasion to give a long disquisition upon the law of bailments. In the course of it he said that common carriers are bound "to carry goods against all events but acts of God and of the enemies of the King. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable." And the reason is, that otherwise they "might have an opportunity

[1] Woodlife's Case, Moore, 462, makes that clear, I think. Though both are paid, a distinction is drawn between factor and carrier.

[2] Holmes, Common Law, 200.

[3] 2 Ld. Raym. 909 (1703).

of undoing all persons that had any dealings with them, by combining with thieves," &c.

Was this the starting point of the modern law of carriers? It seems to be a departure from the previous law as I have stated it, but how far departing depends upon what was meant by act of God. Powell appears to include accidental fire, and cites a case where the death by disease of a horse bailed was held an excuse. Lord Holt does not explain the term; but his reasoning is directed entirely to loss by robbery. That "act of God" did not mean the same thing to him and to us is made probable by the language of Sir William Jones,[1] whose work on Bailments follows Lord Holt's suggestions closely. After stating Lord Holt's rule as to common carriers, he adds that the carrier "is regularly answerable for neglect, but not, regularly, for damage occasioned by the attacks of ruffians, any more than for hostile violence or unavoidable misfortune," but that policy makes it "necessary to except from this rule the case of robbery." As to act of God, "it might be more proper, as well as more decent, to substitute in its place inevitable accident," since that would be a more "popular and perspicuous" term. He cites the case of Dale *v.* Hall,[2] which appeared to have held the carrier liable though not negligent; but explains that the true reason was not mentioned by the reporter, for there was negligence. Much the same statement of the law of carriers is made by Buller in his Nisi Prius.[3] It would seem, then, that the change in the law which we should ascribe to Lord Holt was one rather in the form of statement than in substance; but the new form naturally led, in the fulness of time, to change in substance.

In the fulness of time came Lord Mansfield, and the change in substance was made. In Forward *v.* Pittard,[4] we have squarely presented for the first time a loss of goods by the carrier by pure accident absolutely without negligence, — by an accidental fire for which the carrier was not in any way responsible. Counsel for the plaintiff relied on the language

[1] Bailments, pp. 103 *et seq.*
[2] 1 Wils. 281.
[3] Page 69 (1771).
[4] 1 T. R. 27 (1785).

of Lord Holt. Borough, for the defendant, presented a masterly argument, in which the precedents were examined; the gist of his contention was, that a carrier should be held only for his own default. Lord Mansfield, unmoved by this flood of learning, held the carrier liable; and he uttered these portentous words: "A carrier is in the nature of an insurer."

From that time a carrier has been an insurer without the rights of an insurer.

55. EARLY FORMS OF CORPORATENESS[1]

By Cecil Thomas Carr[2]

THE Italians conceived the corporation to be a fictitious person. Now this was a refined and artificial doctrine, and therefore a late one. Before it spread over England, conducted through the channels of Canonism, natural corporateness had already appeared in certain forms. With regard to this natural growth, there are many questions which, if we cannot answer, we ought at least to ask. What was the earliest form of corporateness here? Was it popular with Englishmen? Upon what principle and by whose authority was corporateness granted to some groups of persons and withheld from others? How far did the early form differ from the final, and by what influence was that difference gradually removed?

The early forms of corporateness are two-fold — the ecclesiastical and the lay. Of these the ecclesiastical body was the more abstract, foreign, and fictitious: the lay body was the more concrete, natural, and spontaneous. The spiritual bodies were dependent upon Canonist Law and upon the authorised version as ordained by the Pope. Their want of a natural membership and a natural existence, and their inability to sin and be damned, left them a mere name. On the other hand, the temporal bodies — and especially the

[1] This essay originally formed Chapter IX, pp. 128-149, of the Yorke Prize Essay (Cambridge University) for 1902, "The General Principles of the Law of Corporations," 1905 (Cambridge, University Press), and has been revised by the author for this Collection.

[2] B. A., 1900, LL. B., 1901, M. A., 1904, LL. M., 1907, Trinity College, Cambridge; Barrister of the Inner Temple, 1902.

Other Publications: "Collective Ownership otherwise than by Corporations or by means of the Trust" (being the Yorke Prize Essay for the year 1905), 1907 (Cambridge, University Press), of which compare Chapter VIII on "Communities as Owners."

early forms of municipal association — were vigorous, independent, and full of a corporate spirit; they soon showed themselves fit for that autonomy which is claimed to be native in Englishmen.

In a previous chapter on the corporation sole some slight mention has been made of the beginnings of corporateness in the Church. It is now proposed to consider the beginnings of municipal corporateness.[1]

When did the borough become a corporation?

Presumably we should reply: "When the lawyers conferred upon it an abstract juristic personality." That would be to answer one question by suggesting another.

If a royal charter necessarily implied incorporation, then there were municipal corporations in the time of William the Conqueror. Among the privileges "incident" to the perfect corporation are the right to use a common seal, to make by-laws, to plead in Courts of law, and the right to hold property in succession. If the existence of these privileges necessarily implied corporateness, then there were many municipal corporations within a few centuries of the Conquest. But these privileges were apparently held alike by boroughs which had, and boroughs which had not, a royal charter.

The question is one to which Merewether and Stephens paid special attention. Their laborious *History of Boroughs*, published in 1835, was designed to throw light on what was then the engrossing subject of municipal reform. The sixth of the eleven inferences which they claim to have established declared that the burghal body got its first charter of municipal incorporation in the reign of Henry VI.[2] Their research fixes the first date at which certain magic words are found in use as a formula of incorporation. Being thus concerned with documentary evidence, they nowhere admit that the essence of municipal corporateness is to be found far earlier. Both their facts and their inferences have been vigorously attacked, charters being cited which suggest

[1] Chapter IV of this Essay. See Professor Maitland's articles in L. Q. R., XVI, p. 335, XVII, p. 131.

[2] *Hist. of Boroughs*, Introd. p. v.

formal incorporation and a kind of abstract personality conferred on towns a hundred years before. Dr. Gross observes that municipal corporateness existed as early as the reign of Edward I.[1]

Such differences of opinion illustrate the difficulty of searching for the germ of true corporateness in early institutions. Much caution is needed on a road where milestones are irregular and landmarks few. Stages in the development of gild and borough can be definitely dated (if at all) only when all extant charters have been disclosed, analysed, and classified. The various forms of apparent corporateness are neither clearly marked off from one another, nor capable of classification according to modern standards. Such differences as existed in fact between these various forms are ignored and confused by the vocabulary. If twenty men hold land (*a*) jointly, (*b*) severally, or (*c*) as a true corporation, these are three distinct conceptions: but all three are covered in early times by the one word *communitas*.[2] Inferences based upon names are therefore dangerous. But the ambiguity of words does not rest there. Even in modern English the word corporation is used with such a loose and extended meaning that it is necessary to define the sense in which the word will be used in this chapter. Some writers have applied the word to any association which combines communal ownership and interests with the slightest degree of autonomy and representation.[3] Thus Sir Henry Maine says, "The family is a corporation."[4] Another writer observes that "as cities and built towns have a more compact municipal life and

[1] *Gild Merchant*, I, 93: *Bibliography of Municipal History*, Introd. p. xxvii. See Stubbs, *Const. History*, III, p. 586, and, in the French edition thereof, by Prof. Petit-Dutaillis, the Editor's Appendix VIII: Maitland, *Township and Borough*, pp. 18-20.

[2] See *Township and Borough*, Maitland, p. 12. See also Pollock and Maitland, *History of English Law*, I, pp. 494-5. See, generally, Maitland's Introduction to *Cambridge Borough Charters*.

See Gross, *Gild Merchant*, I, p. 93, n. 3. Communitas perpetua, communitas perpetua et corporata, corpus corporatum et politicum, are expressions used in the charters.

[3] These privileges are given by extant fourteenth century charters.

[4] *Ancient Law*, ed. 6, p. 184, where it is said that the family was a corporation and the patriarch its public officer. See Maitland, *Township and Borough*, p. 21. In its most developed form the family was nothing more than a "herrschaftliche Verband," see Gierke, *Genossenschaftsrecht*, I, p. 90. See Tacitus, *Germ.* c. 20.

action than other places, the notion of corporations (in the political sense) is apt to be exclusively attached to them. But this is quite incorrect. Every place where a court leet has been held is, or has been, really a corporation. Hundreds are corporations. . . . counties are also corporations. So also are parishes and the true 'Wards' of London." [1]

It is proposed to use the word corporation now in the strict sense of a body possessing an ideal personality which is distinguished from the collective personalities of the members which compose the body. In this sense of the word, the family, the county, and the hundred never became corporations.

While examining the early forms of the borough, one becomes aware of other groups of men which might have attained, but which failed to attain, incorporation.

In the village, for instance, there existed, even before Domesday, a kind of communal ownership. Whether the land was first owned by the community, or — which seems more probable — first owned by the individual, we cannot pause to consider. [2] What was the exact nature of that communal ownership we cannot hope to decide. All villages were not alike, and if they were alike they would probably resist any attempt to thrust them into the classes approved by modern ideas.

Corporateness is on no account to be presumed from communal ownership. True corporateness entails a polish and refinement not to be looked for in the early stages of village life. In the words of Professor Maitland, "if we introduce the *persona ficta* too soon we shall be doing worse than if we armed Hengest and Horsa with machine-guns or pictured the Venerable Bede correcting proofs for the press." [3]

Yet although corporateness is not to be presumed where community is found, the existence of communal ownership

[1] Unpublished paper by Toulmin Smith, inserted in Miss Toulmin Smith's Introduction to Early English Text Society's volume on English Gilds.

[2] See the summary of the controversy contained in Sir F. Pollock's *Land Laws* (English Citizen Series), Appendix C; and Professor Petit-Dutaillis' Appendix I on Les Origines du Manoir in his edition of Stubbs, I, p. 765.

[3] *Domesday Book and Beyond*, p. 356.

offers some prospect that corporateness may appear later. But that is just what does not happen in the village. The village is never incorporated. At first it is too small, too unimportant, too ill-organised. Its geographical limits, its agricultural system, and the natural feeling of neighbourliness tend to make a unit of its inhabitants; but the group of persons never becomes a true group-person. At a later date the village fails to attain corporateness for another reason. In England, as in Germany, the "kings became powerful and the hereditary nobles disappeared. There was taxation. The country was plotted out according to some rude scheme to provide the king with meat and cheese and ale. Then came bishops and priests with the suggestion that he should devote his revenues to the service of God, and with forms of conveyance which made him speak as if the whole land were his to give away." [1] And so, when the king has learnt that the land is his land, and is a source of possible profit to him, the villages throughout the country begin to fall under the dominion of lords. Henceforward the village develops not so much of itself as under the lord — and perhaps in spite of him. He interposes himself between it and all those external forces which might otherwise have hammered it into corporate shape.

A similar result occurred in the case of the manor. The manor was an economic, administrative, and judicial unit, but, as such, it failed in general to become a group-person, because there was one person (the lord) who could always represent the group of persons contained in the manor. What the manor was is not precisely known. It was certainly a financial unit in the assessment of Domesday and long afterwards. Taxes were more conveniently and speedily collected in large round sums from rich landlords than in small sums from scattered and possibly insolvent tenants. Consequently the landlord was made to stand between the king and the group of manorial taxpayers who might otherwise have been ultimately formed into a corporate organisation. There was never in the village or in the manor that

[1] *Domesday Book and Beyond*, pp. 351-2: and see *Bookland and the Landbook*, pp. 226, etc. in the same vol.

keen sense of common property, of profitable common assets, of common revenues and privileges, which so largely assisted the borough to realise corporateness.

The county also and the hundred failed to become generally incorporated. They lacked the importance, the spontaneity, and the unity of the borough: they had no such opportunities or desire for organising a natural self-government: they had no such privileges to strive for and to maintain.

Both county and hundred were governmental districts:[1] each had a court, and apparently each had had communal property.[2] Some counties even possessed such charters as were given to early boroughs. Devon and Cornwall received from King John grants of liberties which were in form not unlike the grants made to towns.[3] They were treated as a *communitas*, a collective body of men whom to name individually would be impossible as well as wearisome. A grant of liberties had been made by John in similar form to all the free men of England and their heirs. But the Magna Carta no more made England a corporation than the charters to Devon and Cornwall incorporated the men of those counties. The western shire may by its position and history have possessed and preserved an unusual degree of exclusive unity. There seems to have been a common seal belonging to the county of Devon.[4] The county also was capable of being indicted, although it was doubtful how damages could be recovered from it,[5] "Among the several qualities which belong to corporations," says Lord Kenyon, C. J., in 1788, "one is, that they may sue and be sued: that puts them, then, in contradistinction to other persons. I do not say that the inhabitants of a county or a hundred may not be incorporated to some purposes, as if the king were to grant

[1] See Pollock and Maitland, *History of English Law*, I, pp. 534, 556. For the ordinance of the holding of the Hundred see Kemble, *Saxons in England*, I, pp. 515-6.

[2] See Pollock and Maitland, ib. I, pp. 535, 557-8. And see *Domesday Book and Beyond*, Maitland, p. 355, n. 2.

[3] See Pollock and Maitland, *History of English Law*, I, pp. 535, 673-4.

[4] See ib. I, 535, n. 1.

[5] See Pasch. 17 Edw. II. f. 539 (Maynard): The county is still indictable as such. Its lands are vested in a county official, the clerk of the peace, who is by 27 Eliz. c. 13, a corporation sole. See 21 & 22 Vic. 92. See Pollock and Maitland, *History of English Law*, I, 535, n. 3.

lands to them, rendering rent, like the grant to the good men of Islington town. But where an action is brought against a corporation for damages, those damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate: but if the county is to be considered as a corporation, there is no corporate fund out of which satisfaction is to be made." [1] The county therefore, though an organised collective body with group liability, failed to obtain a corporate existence apart from that of the several inhabitants.

That appearance of corporateness which grew up in the English boroughs was a native English product. However Italian may have been the principles which came to govern the corporation at the end of the Middle Ages, it is doubtful whether there was anything Roman about the earliest English municipalities, except perhaps, here and there, the fortifications. The connection with Rome which was afterwards so well maintained in the ecclesiastical houses, had been broken in the towns. The thread of Roman influence in England had been snapped when the Romans retired and left the country to relapse into barbarism.

From that barbarism and lawlessness there emerged at length the true germ of municipal life. It was the burh, the strong place upon a hill, the rallying-point and shelter for the country-side. At first it was neither large, nor populous, nor well-built. It was just such a stockade as any man might make wherewith to enclose and protect his house. But it protected a group; and it was the interest and duty of the group to establish and maintain the defences. Not only must each man help to build and repair the walls, but he must also help to maintain some kind of rough discipline within them. There must be no burh-bryce,[2] no breach of the burh or borough.[3] The burh is sacro-

[1] Russell *v.* the Men of Devon, 2 T. R. at p. 672.

[2] See *Domesday Book and Beyond*, Maitland, p. 184.

[3] No distinction is here made between the words "burh," "bury," "burg" and "borough." "The word 'borough' signifies security with the collateral idea of defence. It is no other than the word 'bury.' The word 'bury' signifies a fort or stronghold, and is to the English language what Arx was to the Latin, or Polis (in its archaic use equivalent to ἄκρον ἀκρόπολις) was to the Greek." *Bath Ancient and Modern*, Prof. Earle, pp. 84 and 6-7.

sanct.[1] Moreover, the greater the burh, the more sacred the peace therein.[2]

Then, because there was peace in the borough, men carried on their buying and selling therein. There were witnesses: there were all the materials for doing right between honest men and thieves, and generally for hearing the case of any who had a grievance. If it was well to have witnesses for the sale of cattle and goods, it was not well to have sales of cattle and goods where there were no witnesses. Consequently men sought the site of the burh because it was a military and a marketing centre, a meeting-place, and a place for obtaining justice.[3]

The military needs of the country-side in time became less pressing, but otherwise the burh or borough grew in importance. After the Norman Conquest the town was not protected by a common fort, but was dominated by a castle.[4] The institution of these castles was typical of Norman rule. The king assumed a new position as the overlord of each of his subjects: henceforward a universal "king's peace" was to be substituted for the various local "peaces."

But in spite of the pressure of Norman rule the rise of the boroughs was not for long impeded. Open rebellion had been powerless to regain England for the English, but in the towns the innate Saxon spirit of self-government asserted itself. Commerce grew: population increased: the position of the old burghal shire-towns was strengthened. Their importance began, however, to be challenged by upstarts, enfranchised manors, and other vills which enjoyed religious or commercial advantages. Still it was possible to distinguish the old borough from its newer rivals by a test which was not theoretic, but practical. It was not a difference arising out of the presence or absence of royal gifts of franchise: it was a difference arising out of facts within men's knowl-

[1] A reminiscence of the borough-peace perhaps survives in the word "burglary" and in its early definitions.

[2] The greatest of all peaces is the king's peace, which the Justices of the Peace locally maintain. See 1 Edw. III. st. 2, c. 16.

[3] See *Township and Borough*, Maitland, p. 211.

[4] As for instance at Cambridge; two castles were found necessary to dominate Durham. See Freeman's *William the Conqueror*, p. 117.

edge. Local representation was required when the judges were sent round the country on circuit. The vill sent a reeve and four men to attend the justices in eyre: the borough sent twelve men. There was an unmistakable distinction of fact.[1] A town either did, or did not, send twelve men. The distinction was perpetuated in two ways. In the first place it was important for the governors of the county. By the rough and ready methods of direct taxation in the twelfth century, "cities and boroughs"[2] were charged with the payment of certain gifts and "aids." The Exchequer was not likely to allow uncertainty to exist with regard to the towns which owed the tax. Secondly, the distinction was an important one for the governed, when the parliamentary system was created in the time of Edward I. For the first great representative council[3] writs were directed to the sheriffs of certain counties and to certain boroughs and cities, commanding the recipient to choose knights, burgesses, and citizens to attend.[4] The borough contributed its two burgesses if it had previously sent its twelve men to attend the justices in eyre. There was thus less doubt whether a town was or was not a borough.

The communalism of the early village was not reproduced in the early borough. This was not because there was lacking among burgesses the identity of agricultural interest which existed amongst villagers. On the contrary there was a strong pastoral element in the early borough. But the burgesses, when once they ceased to form units in the scheme of national and local defence were not knit together by reason of land tenure. Trade and the borough organisation upset the old agrarian scheme. The borough had to fight its own battle against trade rivals at a time when commercial success was a matter of trade monopoly. It had to struggle for itself

[1] Probably the distinction of the borough is to be traced still earlier. See the laws of Edgar (959-975 A. D.), Supp., cc. 3, 4, 5, and 6. Ethelred (978-1016) 11, c. 6. Canute (1016-1035) Secular Dooms c. 18. See Stubbs, *Select Charters*, pp. 70-2.

[2] The city cannot be marked off from other towns on any very clear principle. *Civitas* is often — but not necessarily — the cathedral town. See Pollock and Maitland, *History of English Law*, I. p. 634.

[3] Jan. 20, 1265.

[4] See Stubbs, *Const. Hist.* v. 2, pp. 92, 221: Todd, *Parl. Govt.* (ed. Walpole), (I. 23-4).

to obtain its monopoly, to win its charter, to gain its right to manage itself and farm its own tolls. It was these common aspirations and interests which bound the burgesses together. They were not united as were the villagers, by reason of their being tenants of one lord.

The burgesses indeed were not tenants of one lord. Their tenure was heterogeneous.[1] Homogeneity vanished before the new influences of burghal life.[2] And because there was less homogeneity in burghal tenure, the lord had the less power in the borough. The burgesses dealt with the king direct: they excluded the mesne lords. The king exacted his tolls and taxes from the townsmen, and they tried to win from him the recognition of their rights of meeting and market. They strove to eliminate the middleman. They offered a fixed round sum as the farm of their borough, and desired to assess for themselves in their own manner the relative liabilities of burgesses to make up that sum. Thus the payment of the *firma burgi* by the community was the beginning of municipal self-government, and a step — though not the final step — in the direction of corporateness.

Some important results follow. Burgesses did not hold land as an individual held it. They broke loose from the feudal system. They evaded, when they could, the discharge of feudal dues. The lord of the land lost his near interest in it: he lost his escheat: he became remote: he sank back into the position of "the man with a rent-charge."[3] The men of the borough contended stoutly for the authority of the burghal courts, and for the validity of alleged burghal customs. One such custom concerning burgage tenure[4] as upheld in the borough court permitted men to bequeath their houses by will, as "quasi-chattels."[5]

[1] See *Domesday Book and Beyond*, Maitland, p. 179.

[2] See *Township and Borough*, Maitland, p. 45; *Domesday Book and Beyond*, p. 203.

[3] *Township and Borough*, p. 71.

[4] For burgage tenure see *Domesday Book and Beyond*, p. 196: *Township and Borough*, p. 71: Pollock and Maitland, *History of English Law*, I, 295-6, II, 330.

[5] The borough Courts successfully contested the jurisdiction of the ecclesiastical judges in the matter of these bequests. See O. W. Holmes, *Law Quarterly Review*, I, p. 165.

The borough Courts claimed to dispense with the foreign procedure

The borough had considerable advantages to lose. These advantages were intimately concerned with the prosperity of the community, and so were highly prized. They were for the most part of spontaneous growth, not acquired by formal grant. The king had not yet formulated in full his royal right to confer upon, and withhold from, groups of townsmen various privileges which might be made a source of profit to the royal purse. Hitherto these privileges had been claimed by the burghers without offence and exercised without restriction.[1] But the day came when the kingly prerogative was asserted in order to uphold the kingly dignity and fill the kingly pocket. It was to the interest of the Crown that liberty enjoyed by the subject should be considered a diminution of the power enjoyed by the king; consequently it was a gracious concession on the part of the king, which the subject should acknowledge with gratitude and even payment. However strong the natural growth of these burghal privileges, the borough was not safe in its possession of them until they were recognised and confirmed by the authority of the Crown. Natural prescriptive right had to be supplemented or supplanted by royal authorisation.[2] The burgesses wished

of wager of battle (*Social England,* I, p. 363), but were not at first allowed the method of trial by jury. See Pollock and Maitland, *History of English Law,* I, p. 643.

[1] For these burghal privileges see Pollock and Maitland, ib. I. pp. 643, etc. They are there enumerated as (i) Jurisdictional, (ii) Tenurial, (iii) Mercantile, (iv) the Firma Burgi, (v) Property of the Borough, (vi) Election of Officers and Government of the Borough, (vii) By-laws and Self-Government, (viii) Self-taxing Powers, (ix) Gild Merchant. The privilege of minting money was early resumed exclusively into royal hands.

[2] The following is a specimen of such royal confirmations. It is given by Henry II. to Winchester:

"Praecipio quod cives mei Wintoniensis de gilda mercatorum cum omnibus rebus suis sint quieti de omni thelonio, passagio et consuetudine; et nullus super eos disturbet neque injuriam neque contumeliam eis faciat super forisfacturam meam . . ." Stubbs, *Select Charters,* p. 158. This charter appears to be common form. The citizens of Bath are by their charter given the advantages held by "cives nostri Winton de gilda eorum mercatoria": Guildford also "prout cives civitatis Wintonie et aliarum civitatum et burgorum": similarly Petersfield and Wilton. See Gross, II. 351, 375, 387, 390.

It will have been observed that this Winchester grant is not made to the citizens, not to the "communitas" or "communa," but to those citizens who comprise the "gilda mercatoria." The earliest grants of such royal confirmation, or — to use the word in its vaguest sense — of incorporation, are to gilds as well as boroughs. The relation of gild to

to be secure in their title to the franchises which they claimed. There were kings like Richard I who were perfectly willing, for a consideration, to meet the wishes of the burgesses.[1]

Every instance of a charter granted to a town was an opportunity for the Crown to define, to amplify, or to complicate that formula in which earlier royal concessions to towns had been made. Every time the king or the royal advisers framed a charter, he or they had to consider what he was conceding and to whom. Was he making a grant merely to the citizens of a town, or to them and their heirs, or to them and their successors? Who was to have the benefit of the grant when the citizens died? Would the citizens as a body ever die?

It was probably a long while before the *communitas* of townsmen was regarded as anything more than a mere aggregate of individuals. But the more the townsmen acted and were treated as a unit, the more natural it would seem to treat them as a collective person. To regard the group as a single person would be impossible until the group will was regarded as a single will.

Sometimes men are unanimous. In that case plurality naturally becomes unity: the many think and act "like one man." But more often there is dissension: then unity becomes impossible — or possible only by some kind of fiction. Suppose a score of men cry "No," while 80 cry "Aye": to our modern minds it is plain that the "Ayes" have it. But the whole hundred men cannot thereby be said to cry "Aye," unless men are content to ignore the voice of the minority and agree to record a fictitious unanimity. This recognition of the majority as equivalent to the whole, although so readily allowed to-day,[2] is not an early principle. To count polls, to "give one man one vote," to make a man count for one and

borough and the influence of the one upon the other will be discussed later. For the present it is enough that they were not identical, though they might be very closely interwoven in towns where the same men were prominent members of each, and where the mercantile element predominated in municipal affairs.

[1] For the venality of the royal prerogative in the time of Richard I see Stubbs, *Select Charters*, p. 256.

[2] An obvious exception to the modern supremacy of the majority is the requirement of unanimity in a jury. For the history upon this point see Pollock and Maitland, *History of English Law*, II. pp. 625-7.

no more, must have seemed in the Middle Ages unnatural and inconvenient. The opinion of the sage was thereby made of no greater weight than the opinion of the fool.

Italy and the Church helped to establish the authority of the *major pars*.[1] It was conceded that the will of the *universitas* could be expressed by the *major pars* of members properly present at a proper meeting, if the *major pars* were also the *sanior pars*. Henceforward the shout of the *major et sanior pars* was allowed to drown the shout of the minority. When a minority began at length to be considered as bound by the vote of the majority, the *communitas* of the whole body began to show a truer corporateness.[2]

Two other influences were at work to unify and personify the group, the common seal,[3] and the common name. The use of a seal provided a tangible token of burghal unity and unanimity. The seal was an authoritative sign which many men who could not read could recognise. The formal affixing of the common seal sanctified the expression of the common will and accentuated the singleness of the collective person. This accentuation was deepened by the existence of a common name.[4] The possession of a common seal and a common name tended to mark off the borough community from other bodies which consisted merely of co-owners or joint tenants. The names of nascent corporations remained, however, suggestive of collective rather than single personality. The borough of *X* and the university of *Y* are legally described as the Mayor, Aldermen, and Burgesses of *X*, and the Chancellor, Masters, and Scholars of *Y*.[5] The collective character of such corporate names show how hardly the personality of the group was to be distinguished from the sum

[1] See Pollock and Maitland, ib. I, p. 509: *Township and Borough*, Maitland, pp. 34-5: *Political Theories of the Middle Ages*, VII., and Prof. Maitland's notes, pp. 166-7 (in square brackets).

[2] See Gierke, *Genossenschaftsrecht*, II, 478, III, 322, etc.

[3] See Pollock and Maitland, *History of English Law*, I. pp. 683-4.

[4] The corporate name, says Blackstone, is the very being of the constitution of the body, the knot of its combination, without which it could not perform its corporate functions. *Comm.* I. 474-5.

[5] Sometimes these corporate names were so cumbrous as to need abridgment by subsequent charter. See the charter of the Merchants Adventurers for Discovery of New Trades, 1566: "Whereas . . . the Fellowship's name is long and consisteth of many words."

of the members thereof. Nevertheless the facts were being prepared for the theory.

There is nothing surprising in the idea that a group of men is capable of collective action. Instances of early group-action might be multiplied almost indefinitely. There was, for example, group-accusation in the process of frank-pledge: in the village there was group-liability, in the manor group-payment. When the group-action becomes organised, the group is readily conceived to act as a person.[1] One remarkable case of village personality is to be found in the Select Pleas in the Manorial Courts:[2]

"Ad istam curiam venit tota communitas villanorum de Bristwalton, et de sua mera et spontanea voluntate sursum reddidit domino totum jus et clamium quod idem villani habere clamabant."

The village of Brightwaltham appears in Court as an organised community, a definite party to an action. By virtue of a quasi-juridical personality it enters into a formal agreement with the lord of the manor. It resigns its claim to the wood of Hemele, and in return gets rid of the lord's claim to the wood of Trendale. If the feebly organised village had something of juristic personality, the strongly organised borough was likely to possess more. It is therefore the less surprising to find London town spoken of in a Year-book of Edward III as a "Cominaltie come un singuler person qe puit aver action per nosme de comon come un sole person averoit."[3]

If the borough could be thought of as a person, the time was now at hand when it could be considered a perpetual person.[4] Mortmain legislation had hitherto been confined to ecclesiastical associations, but towards the end of the fourteenth century a change took place. It was realised that it was inconsistent and inconvenient that citizen groups should be exempted from the laws which were applied to religious

[1] For instance, if the village acts as farmer. See *Villainage in England*, Vinogradoff, pp. 356, 360: Madox, *Firma Burgi*, 54 f, 54 g.

[2] Ed. Maitland, II *Selden Society*, p. 150. Vinogradoff, pp. 358-9.

[3] Liber Assisarum, 62, 19 Edw. III. See the valuable list of references in Gross, I. 93, n. 3.

[4] See Liber Assisarum, 321, 49 Edw. III; "La City est perpetuel."

groups. Accordingly the Second Statute of Mortmain struck at municipal bodies, because "mayors, bailiffs, and commons of cities, boroughs, and others which have offices perpetual" were "as perpetual as men of religion."[1] Thus this statute was not the least powerful of those forces which were co-ordinating the citizen body with the religious house, and preparing in England the way for the more refined Italian doctrines of corporateness.

To call a borough a perpetual person was to emphasise the distinction between it and its mortal members. To bring the borough into line with the religious houses was to subject it to the exact and polished notions of the Canonists. Side by side the members of the borough and of the religious house had to seek the royal licence to evade the mortmain restrictions.[2]

The charters which the boroughs were now anxious to obtain might be expected to show traces of the canonistic ideas. They might be expected to answer for us the question at what point the borough became a true corporation. But for two reasons the question is not to be answered so easily. In the first place the words and the thoughts underlying the words are vague and defy interpretation. The corporateness of a borough possessing a charter dated from this period is not proved merely by the presence therein of words which in later times implied corporateness.[3] Incorporation was a

[1] 1391. 15 Ric. II, c. 5.

[2] Many towns applied for such charters to hold land. The following is a specimen: — Rex omnibus ad quos etc. salutem. Licet etc. de gracia tamen nostra speciali et pro xx libris nobis solutis in hanaperio nostro concessimus et licentiam dedimus . . . J. S. et W. H., Senescallis gilde mercatorie de Bruggewater et communitati ejusdem ville quod ipsi x mesuagia V acras terre III acras prati . . . dare possint et assignare cuidam Capellano divina in ecclesia beate Marie de Bruggenwater singulis diebus celebraturo imperpetuum, habenda et tenenda sibi et successoribus suis in auxilium sustentacionis sue imperpetuum . . . (1392) Gross, II. 353.

[3] For example here follows a charter of Edward III to Coventry (20th day of January, 1345): —

"Dictis hominibus de Couentre tenentibus dicti Manerii quod ipsi et eorum heredes et successores communitatem inter se decetero habeant et Majorem et Ballivos idoneos eligere et creare possint annuatim." Record Office, Charter Roll, 18 Edward III, m. 1.

Again, the same king grants three years later to the burgesses of Hedon, "quod iidem Burgenses et eorum heredes et successores communitatem inter se habeant," etc. as before (Gross, I. 93 and II. 107).

thing which the burgesses of this period neither wanted nor realised that they lacked. "Nobody, no body wanted it," says Professor Maitland.[1] They wanted to be assured of their privileges to trade, hold land, and the like, but they probably had no desire for, and small knowledge of, corporateness in the abstract. There was in the boroughs a strong indigenous stock of what one may perhaps call "concrete corporateness," upon which the alien growth of abstract corporateness was afterwards quietly and successfully grafted. In the second place the charters of this period are not decisive as to the corporateness of the boroughs, because at this point the confusion between borough and gild can no longer be ignored.

Although closely connected and frequently identified, gild and borough were distinct. Of the many forms of gild the gild merchant now concerns us most. It is sufficiently important to require some preliminary remarks.

Trade in the Roman world was largely in the hands of *collegia*,[2] but it seems probable that the English gild merchant was not the survival of any Roman institution.[3] Whether it was of exclusively English origin,[4] or whether it came from the Continent,[5] it appears in England soon after the Conquest, if not earlier, as a widely-spread trade organisation. In those days the towns were the trading units.

What is conveyed by the language of these charters? Are we to say that the word "communitatem" by some magic of its own confers corporateness upon these two towns? Or are we to say that the word meant nothing more than the acknowledgement of common trading interests, of collective ownership of property, and of a certain degree of autonomy? Would it not be true to say that the thought of true corporateness, if it has been conceived yet, has not yet been applied to the municipal group?

[1] *Township and Borough*, p. 20.

[2] Of some forty-four kinds of trading associations known to have existed in Imperial Rome, only one (the smiths) is mentioned on inscriptions found in England. See *Bath, Ancient and Modern*, Earle, p. 30.

[3] According to Scrutton (*Influence of Roman Law on the Law of England*, p. 55), the birth-place of the gilds is England, and possibly London. Although this statement would probably not find universal acceptance, it is at least improbable that the gilds are a Roman survival. See City Guilds Commissioners' Report (1884), p. 8. For the two views, see Coote, *The Romans of Britain*, on the one hand, and Stubbs, *Const. Hist.*, p. 105 on the other.

[4] On the subject of the Gild merchant see the two volumes of Dr. Gross. See also *Two Thousand Years of Gild Life*, Lambert.

[5] See Gross, I. pp. 169-70.

Commerce was municipal and intermunicipal.[1] The gild merchant, along with the several craft-gilds, supervised the conditions of trade and labour. Thus were regulated processes and prices, materials and tools, working-hours and wages, the number of apprentices and the nature of their duties. Thus also were punished dishonest workmanship, the use of bad stuff, or the use of short weights and measures. Consequently the traders of the town were united in the protection and pursuance of their common trade interests. Just as men met as Christians for mutual comfort and spiritual benefit, so they met as members of a gild for mutual protection and earthly benefit. The gild excluded the alien: it fostered a strong but narrow municipal monopoly. It was consequently a valuable asset of the town, and one for which it was most important to obtain royal recognition. It was largely identified with the town, its members with the townsmen, its system of government with the municipal system of government. This considerable identity has interest for those who are inquiring at what moment the borough became a corporation. For out of this identity arose the theory that the grant of *gilda mercatoria* to a borough was a grant of corporateness.[2] According to this view the gild merchant was the corporate realisation of the borough: the gild machinery was transferred to the borough: the gild-head became the town-head: the gild-alderman became the town-alderman, the gild-hall the town-hall.[3] The supporters of this view point out that the important members of the gild

[1] See *Social England*, ed. Traill, I. p. 467. For example, there was a recognised practice of intermunicipal reprisals. When the king freed burgesses of *X* from toll throughout the realm, he allowed them to make reprisals against men of *Y* taking toll of a man of *X*. These reprisals suggest the idea that a trader was a member of a body answerable for trade acts of other members. In the trade community there was a rough kind of several guarantee by members of a member's debt. The community was in no way a "juristic person." It did not sue, and was not sued, by a common name as would be the practice in the case of the Cives de *X* or the Burgesses de *Y*. See *Select Pleas in Manorial Courts*, ed. Maitland, vol. 2, Seld. Soc., pp. 134-5; Gierke, *das deutsche Genossenschaftsrecht*, II, pp. 388-9.

[2] Merewether and Stephens in combating this view attribute it to Brady, see *History of Boroughs*, p. 118.

[3] See for instance the Early English Text Society's volume on *English Gilds*, p. 250. For the part played in this controversy by the word 'alderman,' see Madox, *Firma Burgi*, 30, and the discussion in Gross.

were the same men as the important members of the borough:[1] that the gild organisation supplanted the old borough moot,[2] and therefore it was by way of the gild that the borough received from the Crown the privilege of incorporation.[3]

This theory, after having won wide acceptance,[4] has been strenuously opposed by Mr. Gross.[5] It must be admitted that in a few cases gild and borough may have become fused, and that in general the spirit and organisation of the gild-community may have affected the development of the borough-community. But if we find that both gild and borough are described by the word "communitas," we must remember that that word was capable of both a refined and a natural meaning. It may well be that the gild-community was as concrete as the truly corporate borough-community is abstract.

No general inference can be drawn with safety from the history of any single town, — least of all from that of London. Apparently at Bristol and at Nottingham the hall of the gild existed side by side with the burghal moot-hall.[6] If it were true to say that the importance of the burghal moot declined while that of the gild increased, it might still be untrue to say that the officials and governors of the gild became the officials and governors of the borough.

The fact that the *liber burgus* and the *gilda mercatoria* were occasionally granted separately seems to show that the

[1] See Early English Text Society's *English Gilds*, p. 329.

[2] Of course gildsmen and burgesses were in the mass identical. The description of Chaucer's *Pilgrims* may be recalled, though the language be untechnical:

"An haberdasher and a Carpenter
A webbe, A Dyere and a Tapiser,
Were with us eek clothed in o liveree
Of a solemn and greet fraternitee . . .
Wel semed ech of them a fair burgeys
To sitten in a gild-halle, on the deys:
Everich, for the wisdom that he can,
Was shapelich for to been an alderman."

(Prologue to *Canterbury Tales*, 11. 362-372). To ask if a man were a gildsman or a burgess would be as unsatisfactory as to ask if he were a father or a son.

[3] See Gierke, *Genossenschaftsrecht*, I, pp. 243-4, 345.

[4] See ib. I, ss. 27 and 37. *Social England*, II, 407.

[5] *Gild Merchant*, I. p. 80.

[6] See Gross, I, p. 82, n. 3.

two were regarded as distinct.[1] The mayor and burgesses of Macclesfield, in answer to the Earl of Chester in the twenty-fourth of Edward III, claim (*a*) *liber burgus*, and (*b*) gild, not only as distinct things, but for distinct reasons.[2]

But although gild and borough were not identical, they were sufficiently similar to deceive Coke.

"Et fuit bien observe," he reported, "que dauncient temps inhabitants ou Burgesses d'un ville ou Burgh fuerent incorporat quant le Roy graunt a eux daver Guildam Mercatoriam."[3]

This dictum was faithfully followed in 1705 by Holt, C. J., in the case of the Mayor of Winton *v.* Wilks. The defendant was accused of having carried on a trade without being a member of the gild-merchant. "The Court was moved in arrest of judgment, and the Judges observed that when in ancient times the king granted to the inhabitants of a villa or borough to have Gildam Mercatoriam, they were by that incorporated, but what it signified in this declaration nobody knew."[4]

This opinion of Coke appears untenable. To suppose that the possession of any one of the incidents of corporateness necessarily implied the existence of a corporation is inaccurate. A similar error was cherished with regard to the possession of a Firma Burgi.[5] The possession of this, one of the franchises of a fully incorporated borough, was from the time of Edward IV considered to imply municipal incorporation. The rights of having a mayor, of being toll-free, and of using a corporate name,[6] appear in like manner to have been considered to imply the legal incorporation of a borough, although in fact the possession of such rights might leave a borough still far from true corporateness.

[1] See the grant to Newton (South Wales). Gross, II, pp. 385-6.
[2] See Gross, II, p. 171.
[3] Coke, 10 Rep. 30. And see 1 Roll Ab. 513: cited in Blackst. *Comm.* I. 474. See also Cokenage *v.* Large, Madox, *Firma Burgi*, 197.
[4] Kyd, *Corporations*, I, p. 64. See Gross, II, p. 269.
[5] See Kyd, ib. I, p. 43.
[6] In Norris and Trussell, etc. *v.* Staps (Pasch. 14 Jac. Rot. 907), it is said: "I am of opinion that they (the guardians, etc. of Newbury) needed not to show how they were incorporated, for the name argues a corporation, as the like of cities." Hobart, 210. See Arundel's case, ib.

The existence of burghal privileges and burghal property raised the question in whom such privileges and property vested. Gradually men had ceased in this connection to speak of the "burgesses and their heirs," and spoke rather of the "burgesses and their successors."[1] In many towns there was a steady municipal income derived from various sources.[2] It was something to be able to distribute this, and perhaps to share in the distribution. It was something to be a burgess. In consequence citizenship became restricted. Mere geographical connection with the community was not necessarily a sufficient qualification. A town would contain many men who were not freemen of it. The freedom of a city was heritable, though not strictly hereditary, because a man and his son might both be freemen simultaneously.[3] Freedom was most usually obtained by transmission from father to eldest son or from a master to his apprentice: in other words, in these two cases less restrictions, and perhaps less entrance-fees, were imposed upon the aspirant to citizenship.[4]

To restrict the numbers and to close up the ranks of the burgesses was to knit them together as members of an organisation now highly complex and ready for the new foreign theory of corporateness. Much of this effect is due to the influence of the gild. The gild-merchant may not have included all the burgesses, and may not have excluded all the non-burgesses, but it existed in order to work the common borough trade to the best common advantage.

p. 64. For plea of corporation without shewing the creation of it, see 9 Edw. III, 19.

[1] See Gross, *Gild Merchant*, I, 95.

[2] See Maitland, *Township and Borough*, Appendix, ss. 145 and 148.

[3] See Pollock and Maitland, *History of English Law*, I, 671. Freedom of boroughs was a matter of custom. See R. *v.* Salway, 9 B. & C. 424. It has suffered from the Municipal Corporations Acts. See 45, 46 Vict. c. 50, s. 202.

[4] According to the *Report* of the Municipal Corporations Commission (1835) freedom was obtainable by (*a*) birth, (*b*) apprenticeship, (*c*) gift, (*d*) purchase, and (*e*) marriage. See the *Report*, p. 2016. See also Gierke, *Genossenschaftsrecht*, I, s. 57. What is important for our purpose now is to notice that the citizenship was restricted, was valuable to the claimant, and was a source of profit to the body of citizens by means of a system of entrance-fees. Citizen-bodies which had paid considerable sums to obtain from the king recognition of their municipal franchises, naturally considered that a new-comer to the citizenship should make to them some payment on his accession to privileges for which they had themselves been put to expense.

It may not have been the mainspring of burghal corporateness, it may not have provided the borough with a ready-made system of government, but it undoubtedly taught the borough some practical lessons. For the gild was the grand example of voluntary association.[1] In an age when men were "drilled and regimented into communities in order that the State might be strong and the land might have peace,"[2] it arose spontaneously[3] and bound men together by ties of social, religious, and commercial support. The feudal system had supported the theory that all power and all right came from above, and was entrusted by God to Pope and Emperor, to be by them in turn transmitted down through a series of chosen agents. But men felt that they had power and rights within themselves, underived from such sources as these: this feeling, finding expression in the principle of voluntary association, triumphed over feudalism and theocratism.[4]

This form of voluntary association had one striking feature. The associates bound themselves by oath.[5] The gildsman swore in a certain formula, promised to obey common rules and to support the gild,[6] paid his entrance-fee and thus became a member. This method of making membership personal and basing it upon a definite ceremony, spread to the borough, where citizenship could no longer satisfactorily

[1] See Gierke, *Genossenschaftsrecht,* I, ss. 26-7, die freie Einung.

[2] Pollock and Maitland, *History of English Law,* I, p. 688.

[3] The origin of the gild-system is variously attributed to heathen and to Christian institutions. Wilda attributes it to the fusion of heathen practices of sacrifice and feasting with the Christian idea of brotherly love: others to Scandinavian associations for mutual revenge, others to more natural associations for mutual support. See Gierke, *Genossenschaftsrecht,* I, p. 222, where see references in n. 1.

[4] See Gierke, ib. I, pp. 155, 220: Althusius, pt. I, c. 2, etc.

[5] The binding by oath seems to have been distasteful to monarchs on the continent. The Capitularium of Charlemagne contains the ordinance "de sacrament per gildonia invicem conjurantibus, ut nemo facere praesumat" (779 A. D.). See Gierke, ib. 1, p. 224, n. 2: p. 236, n. 57.

[6] In the Cambridge gild, for instance, a man swore to hold "true brotherhood for God and all the world and all the brotherhood, to support him that hath the best right," to avenge his comrades in the gildship if an outlaw failed to discharge his boot, and agreed to pay out of the gild funds the wer due from a comrade in a case of emendable homicide. The principle of "Let all bear it, if one misdo" thus provided a rough system of insurance. See Kemble, *Saxons in England,* I, pp. 513-14. Gierke, *Genossenschaftsrecht,* I, pp. 230-1.

be defined according to the quantity of land held or the quality of the tenure.

The adoption of this ceremony and oath by the borough had considerable consequences. Any ill-dealing between fellow-freemen was a violation of that oath, which might be punished by the body of freemen or their representatives. It might or might not be breach of law: it was certainly breach of contract: it was treason to the community. Moreover the man who took an oath on entering the citizenship found himself resembling the monk who took vows on entering a religious house.[1] This was one more power at work to bring the borough into line with the more technically corporate ecclesiastical body.

Artificial membership tended to make an artificial community. The time was coming when the English borough was fit to receive the Italian doctrine, — when its personality might be deemed a *persona ficta*.[2]

[1] See Pollock and Maitland, *History of English Law*, I, p. 671.

[2] Y. B. Hen. VI, 9, in reference to "le Commonalty et les Baill. de Ipswich," says "ils son per cest nom un person corporate et un entier corps." The authority for saying that English law holds the "Fiction theory" of corporateness is usually found in the following sentence from Coke's Report of the *Sutton's Hospital Case* (10 Rep. 32 b): — "The corporation is only *in abstracto*, and rests only in intendment and consideration of the law: it is invisible and immortal." For other theories of corporateness see the following chapters of this Essay; see also especially Professor Freund's *Legal Nature of Corporations*, pp. 40-83.

56. EARLY FORMS OF PARTNERSHIP[1]

By William Mitchell[2]

DURING the Middle Ages contracts of partnership were common, and at their close companies with freely alienable shares had come into existence. In the early centuries the most common form of partnership was the "commenda." This was a partnership in which one of the parties supplied the capital either in the shape of money or goods, without personally taking an active part in the operations of the society, while the other party supplied none or only a smaller fraction of the capital and conducted the actual trade of the association. This form of partnership was especially used in maritime trade and was often confined to single ventures. Its popularity was due to the fact that it enabled the capitalist to turn his money to good account without violating the canonical laws against usury, and the small merchant or shipper to secure credit and to transfer the risk of the venture to the capitalist. The nature of the contract will best be shown by quoting one or two examples of the vast number of these contracts that have been preserved.

The following is a Marseilles contract of the year 1210:

"Notum sit cunctis quod ego Bonetus Pellicerius confiteor et recognosco me habuisse et recepisse in comanda, a te Stephano de Mandoil et a te Bernardo Baldo, xxv l. regalium coronatorum . . . quas ego portabo ad laborandum in hoc itinere Bogie, is nave de Estella, vel ubicumque navis ierit causa negotiandi, ad vestrum proficuum et meum, ad fortunam dei et ad usum maris, et totum lucrum et capitale convenio

[1] This Essay was first published in "An Essay on the Early History of the Law Merchant," Yorke Prize Essay (Cambridge) for 1903 (Cambridge: University Press, 1904), pp. 124-140, being part of c. V.

[2] B. A. Cambridge University, 1903, M. A., 1907.

et promitto reducere in potestatem vestri et vestrorum fideliter, et veritatem inde vobis dicam, et ita hoc me observaturum in mea bona fide per stipulationem promitto, et in omni lucro quod Deus ibi dederit, debeo habere et accipere quartum denarium." [1]

Such contracts were not rare in Italy in the 12th century and the contracts are to the same intent as those of Marseilles in the 13th century. "March 1155. Ego Petrus de Tolosi profiteor me accepisse a te Ottone Bono libras centum viginti septem quas debeo portare laboratum Salernum vel ex hinc apud Siceliam, et de proficuo quod ibi deus dederit debeo habere quartam et reditum debeo mittere in tua potestate." [2]

Often when both parties to the contract contributed to the capital of the association the partnership was termed "collegantia," or "societas," to distinguish it from the more common form of commenda in which the commendator alone supplied the funds.

"Bonus Johannes Malfuastus et Bonus Senior Rubeus contraxerunt societatem, in quam Bonus Johannes libras 34 et Bonus Senior libras 16 contulit. Hanc societatem portare debet Alexandriam laboratum nominatus Bonus Senior et inde Januam venire debet. Capitali extracto proficuum et persone (?) per medium. Ultra confessus est nominatus Bonus Senior quod portat de rebus nominati Boni Johannis libr. 20 sol. 13 de quibus debet habere quartam proficui—. Juravit insuper ipse Bonus Senior quod supradictam societatem et commendacionem diligenter salvabit et promovebit societatem ad proficuum sui et Boni johannis et commendacionem ad proficuum ipsius Boni johannis et quod societatem omnem et ipsam commendacionem et proficuum in potestatem reducet ipsius Boni Johannis." [3]

But whether the commendator alone or both parties contributed to the capital, the association remained essentially

[1] *Documents Inédits sur le Commerce de Marseilles au Moyen Age*, by Blancard, Document 4, vol. I. p. 7. There are scores of similar contracts of Commenda in these two volumes, and there are numerous 12th century examples in the volume of Chartae in the *Monumenta Historiae Patriae*.

[2] *Monumenta Historiae Patriae*, Chartae, column 287.

[3] Goldschmidt, *Handelsrecht*, p. 260 and note 88 b.

of the same character. The commendator in both cases was a kind of sleeping partner, and it was left to the "tractator" to carry out all the necessary operations. Though the partnership was generally formed for the purpose of a definite speculation, it was also formed for an indefinite series of commercial transactions, or for as indefinite or sometimes a definite time, which was occasionally as long as 10 years.[1]

As a rule the commendator who supplied the capital took the risk of the transaction; if the goods were lost he could not recover the amount he had advanced, provided that the contract contained the usual clause "ad risicum et fortunam Dei, maris et gentium," or its equivalent. The usual share in the profits of a tractator who brought no capital into the partnership was a quarter, while in the case where he contributed to the general fund, his share of the profits amounted to a half. It is hard to tell whether the "tractator" in early times always traded in his own name, though there is no doubt that in later times he did.[2] Pertile holds the view that originally the tractator was regarded as a mere factor of the commendator who was responsible for the acts of the tractator, but that gradually in the course of time the principle was established that he was only responsible to the amount of the capital which he had advanced.[3] In Florence this principle was definitely established by statute in 1408. In the medieval commenda was represented both the dormant partner and the principle of limited liability of modern times. The commenda was not confined to England:[4] it existed during the Middle Ages in Germany and Scandinavia.[5] In cases where there were several commendators who entrusted their capital to one or more tractators, the latter began to assume

[1] Goldschmidt, p. 264.

[2] Goldschmidt, p. 265 and note 104. Lattes, *Il diritto commerciale*, p. 157.

[3] Pertile, *Storia del diritto italiano*, IV, 685, note 24. Cf. Viollet, *Histoire du droit civil français*, p. 762. "Dans la société le bailleur de fonds ou commendataire n'est passible des pertes que jusqu'à concurrence des fonds qu'il a mis ou dû mettre dans la société."

[4] [An example of a commenda in early English trade is found in Gross' Select Cases in the Law Merchant, I, 77, dated 1300 (Selden Soc. Pub., vol. XXIII, 1908) — Eds.]

[5] Norrnheim, *Geldersen's Handlungsbuch*, Introduction, 43-5.
Amira, *Nordgermanisches Obligationsrecht*, vol. II.

a more independent position towards commendators. Contracting in their own name the managers were responsible for the debts of the association, while the commendators were freed, in Florence as early as 1408, from all liability beyond the amount of their quota. This type of commenda was a natural development of the simple original type in which there were but two persons involved, — a single commendator who advanced the capital to a single tractator; but it was an important development, and in the 16th century it was regulated in Italy by several city statutes and in the following century in France by regulation.[1] Thus regulated the society contained both members with limited liability and members with unlimited liability, and it was the latter that controlled the administration of the society. The older and simpler form of commenda, however, existed side by side with the newer and more complex type. Of the newer type the modern "Société en commandite" is the historical descendant and it is characterised by the same essential features, the existence of two classes of members, the one with a responsibility limited to the amount of the capital they have contributed, and the other with an unlimited liability for the debts of the society, the administration of which lies solely in their hands.[2] On the other hand the commendator of the older and simple type of commenda has his counterpart in the dormant partner of modern commercial law.

But side by side with the commenda there existed throughout the Middle Ages a closer kind of partnership in which the partners were normally coordinate members of the association with the same privileges and responsibilities. The usual expression for this type of society was "compagnia" or "societas," and the firm was generally designated by the name of one of its members with the addition of the phrase "et socii," or the like. It became an essential feature of this form of partnership that the partners were all of them responsible individually for the debts of the firm.[3] At no time in Italy was the power of partners to bind by contract their

[1] Goldschmidt, 269. Lattes, p. 162 and notes.

[2] V. Thaller, *Traité Elémentaire de Droit Commercial*, §§ 258-262, pp. 160-162.

[3] Lattes, p. 161 and notes.

fellow partners in practice denied.[1] The principle of direct representation was thus admitted, and Baldo writing in the 14th century declared "ex consuetudine mercatorum unus socius scribit nomen alterius."[2] Baldo however adds that this was "abusio." This was an important advance upon the principles of both Roman and old Germanic law, neither of which recognised sufficiently the principle of direct representation. "All this view of the law," says Kohler writing of the principle of representation, "appears altogether artificial and cannot well appeal to primitive man: he cannot understand a transaction (based) upon the will of another; even a developed law like Roman law has only developed 'representation' very imperfectly and German law long resisted it."[3] Medieval merchants and mercantile usage recognised the principle of representation; they recognised it not only in the right of one partner to make contracts binding upon the other partners of a firm, they also recognised it in the medieval bills of exchange with their clauses to order or bearer.

As the names of all partners did not appear[4] in the name of the firm, but were simply referred to generally in the phrase "et socii" or some equivalent expression, it became important to determine who were to be legally regarded as members of the firm. In early Italian statutes actual common trading of the persons concerned, or general notoriety, sufficed to prove the partnership: "et intellegantur socii qui in eadem statione vel negotiatione morantur vel

[1] Cf. however pp. 188-189 below.

[2] Goldschmidt, p. 276, note 139.

[3] Kohler, "Zivilrecht" in *Holtzendorff's Encyklopädie der Rechtswissenschaft*, ed. 1904, I, p. 598. Kohler quotes from and refers to many Italian authorities of the 12-14th century on representation. Among them St. Como (A. D. 1232). "Tantum valeat et prosit illi, ad cujus partem vel cujus nomine facta est vel recepta, ac si illam cartam vel contractum vel obligationem recepisset."

St. of Brescia, regulation of A. D. 1252 in St. of 1313. "Quod ex omni contractu inito et facto nomine alterius, tam de mercato quam de aliis rebus, acquiratur actio et acquisita sit illi vel illis, quorum vel cujus nomine contractus sive promissio factus est vel facta."

[4] Bartolus. "Secundum consuetudinem et fere totius Italiae — litteris mercatorum unus nominatur nomine proprio et omnes alii nomine appellativo, hoc modo: Titius et socius talis societatis," quoted by Goldschmidt, p. 276, note 137.

mercantur ad invicem." [1] In doubtful cases the books of the firm were consulted.[2] But general notoriety and the books of the firm were not found sufficient either to protect the general public against partners who denied the partnership altogether or who asserted that the partnership had been dissolved, or to protect merchants from a general liability for all the debts of a trader with whom they occasionally combined for the purpose of a common speculation. Dissolution of partnerships was to be valid only if effected "per instrumentum publicum." "If any one practising in the Calimala craft," says a Florentine gild statute of 1301, "or having a share in any 'societas' of that craft has renounced or shall renounce it in the future, such renunciation shall not be valid nor be admitted by the consuls, unless he shall show that he withdrew from that firm by means of a public document, and the consuls shall have that document published throughout the whole craft." Registration of partners became usual; from the 14th century onwards such registers were kept not merely by the gilds but by the city authorities; and the registration required, as a rule, "the direct intervention either personally or by special procuration of all the members of the firm." [3]

It has been stated that one partner could represent the rest and make contracts binding upon the whole firm, and that this was an advance upon the principles of Roman and Germanic law, which only recognised representation to a limited degree. But though a single partner could thus represent the firm, originally it was as a rule only in virtue of special procuration that he was privileged so to do. In the medieval contracts of partnership the partners often gave one another by procuration the right to represent and bind the firm. In the absence of such clauses in the contract creditors of the firm for a debt contracted by an individual partner could in some places only make good their claim against the firm as

[1] St. Mutinae, 1327, quoted among others by Goldschmidt, 276, notes 140 and 141.

[2] St. of Calimala of Florence, Lb. ii. rubric 43. "*Si quis . . . librum* corporis sue societatis celavit vel celaverit ita quod haberi et *videri non possit quod sit sotii* (sic) *dicte societatis.*" Cf. Lattes, p. 174, note 59 and p. 283.

[3] Lattes, p. 162 and note 68.

a whole, if the debt had been recognised as a debt of the firm, as by entry in the firm's book, or employment of the money or goods for the common purposes of the firm. Simply in his capacity as partner a merchant had not everywhere in the early centuries of the Middle Ages a right to bind his copartners. "Whoever in the city or district of Florence," declares a Florence gild regulation of the year 1236, "has sold cloth or other things pertaining to trade to any one of this gild cannot seek nor sue for the money or price of the sale from any of the partners of the buyer, or from any one of his firm, unless the money shall be found written in the books of the buyer's firm as payable for the price of that sale." [1] Similarly the gild statute of Verona for the year 1318 required the tacit consent of the other partners or an express promise on their part to pay — "nec praejudicet etiam stando in statione et essendo socius palam; dummodo non esset praesens cum socio ad accipiendam mercandiam et non promitteret de solvendo eam."

As late as the 15th century the jurist Alexander Tartagnus denies the responsibility of the other partners, unless the contract had been made with full powers "nomine societatis." [2] Slowly however the principle gained ground that a partner had as partner the right to make contracts binding upon his firm. In all probability this change was due to the frequency with which the individual partner was entrusted with this power by special procuration. Thus in one of the Marseilles documents of the 13th century which have been already referred to, two partners concede full powers to the third. "Nos Dietavivo Alberto et Guidaloto Guidi, Senenses facimus, constituimus, ordinamus, Bellinchonum Charrenconi, consocium nostrum, absentem, nostrum certum et generalem

[1] St. of Calimala, 1301, Lb. ii. rubric 19. The date 1236 is given in the rubric.

[2] Goldschmidt, 281, note 154. Goldschmidt gives many quotations from and references to city and gild statutes, *inter alia* St. of Calimala Gild (1341). "E niuno mercantante di questa arte possa obligare in Firenze o nel distretto la sua compagnia o alcuno compagno della sua compagnia — se non in debiti o cose che fossono scritte nel libro o libri della sua compagnia, o se almeno due o più de' compagni non fossono insieme a tale obligazione fare, o se non avese in ciò speciale o generale procurazione e mandato da' suoi compagni."

procuratorem in omnibus nostris negotiis peragendis, . . . promittentes nos ratum perpetuo habitaturos quicquid cum eo vel per eum actum fuerit in praemissis, sub obligacione omnium bonorum meorum praesentium et futurorum."[1] Such procurations were exceedingly common,[2] and the great Calimala Gild of Florence went so far as to instruct (1301) all its members when they sent any one abroad to transact business to provide them with a special or general procuration. The result was that in actual practice the partner did have power to bind the firm, and that gradually this power was regarded as a matter of course. During the 14th and 15th centuries numerous Italian statutes recognised the responsibility of the other partners for the debts and contracts made by an individual member of the firm. But both the doctrine of the great civil jurists and the decisions of isolated commercial courts were long opposed to this new view of the position of the partner. Thus the decisions of the "Rota of Genoa" only go so far as to say that whatever is written by one of them having the "facultas" of using the name of the firm is said to be written by the firm itself, while another decision declares most plainly that such "facultas" is not to be taken as a matter of course. By the 17th century however the power of an individual partner, though without special procuration, to act in the name of his firm was admitted by the civil jurists.[3] The unlimited liability of the partner for the debts of the firm was, like the right of the partner as partner to represent the firm, of gradual growth, and was not in the early centuries of the Middle Ages universally enforced by the law.[4] In medieval contracts unlimited liability was indeed often stipulated and was in some places a maxim of the law: in the fairs of Champagne, for example, the unlimited responsibility of partners was under certain conditions expressly recognised; the "usage of the fairs" declared that a partner "oblige tous leurs biens (*i. e.* the partners) pour cause de l'administration qu'il a et qu'il semble avoir, et plus, se aulcun

[1] Blancard, *op. cit.*, no. 115.
[2] See numerous quotations and references in Goldschmidt, p. 282, note 155.
[3] De Luca, *De Camb.*, disc. 29, nos. 3, 4, quoted Goldschmidt, p. 283.
[4] Goldschmidt, pp. 284 and 288 and note 159.

des compaignons se boute en franchise ou destourne ses biens ou les biens de sa compagnye, il est oblige et tout li autre compaignon qui paravant cette fuite ou tel destournement des biens n'estoient obligez en corps et en biens par la coustume, stille et usaige des foires notoires." [1] It was not however till towards the close of the 16th century that the solidarity of partners was in Italy generally recognised. "Only gradually and without the support of positive law the liability of every partner 'in solidum' came through mercantile usage to be enforced in statutes and judicial decisions. This liability was repeatedly recognised in the decisions of Genoa. Since that time it was never a matter of doubt," [2] and in the 17th century the jurist Ansaldus who, as auditor of the Roman Rota, must have had a thorough acquaintance with judicial decisions in commercial cases, recognised this unlimited liability and declared that in the first place the creditor had recourse to the capital of the firm, and only in the second place could he avail himself of the unlimited liability of the individual partner. [3]

The commenda and the societas had an independent origin and an independent development. Originally the commenda was a purely speculative enterprise, confined mainly at first to maritime trade in which one partner found all or most of the capital and the other traded in his own name. The societas on the other hand had its root in the more permanent association of the family or of persons who had full confidence in each other for the purpose of carrying on, in common, industrial and commercial enterprises in city or town. Both extended the scope of their application, commendas were formed for inland trade and partnerships of the collective type for maritime commerce. Each however developed on its own lines. In the commenda, where from the first the capitalist must have as a rule remained unknown to the merchants who traded with the active partner, the limited liability of the capitalist and the unlim-

[1] Goldschmidt, 285, note 160.
[2] Endemann, *Studien in der romanisch-kanonistischen Wirtschafts- und Rechtslehre*, vol. I. p. 395.
[3] Endemann, *op. cit.*, pp. 395-6 and 55, 56.

ited liability of the active partner were before long firmly established, while in the open "societas" the right of the individual partner to represent and bind the firm on the one hand, and on the other his unlimited liability for its debts, were finally recognised. Both types, modified in points of detail, have passed into modern commercial life. If the commenda has developed into the "Société en commandite," the "societas" has its historical counterpart in the modern "Société en nom collectif" and the Offene Gesellschaft.

A third type of partnership, that of joint-stock companies with the capital in the shape of freely alienable shares, with a liability limited to the amount of capital represented by the share, and with an administrative governing body composed of shareholders in which the majority decided, was in process of formation during the Middle Ages.

To the origin of this type of partnership many causes contributed, but the decisive cause was the growth of colonial enterprises in Italy in the 15th century, and in Holland, France and England in the 16th and 17th centuries. A recent German writer[1] has attributed a great influence upon the birth and development of these companies to a peculiar form of partnership with limited liability that in shipping enterprises was common both in Northern and Southern Europe during the earlier part of the Middle Ages. At Amalfi, for example, in the 11th century the owners, the captain, and even the common sailors all had a share in the profits of the voyage and formed an association whose liability was strictly limited.[2] But it can hardly be said that the adoption of this peculiar form of partnership had a great influence upon the formation of joint-stock enterprises. No doubt it offered an example of a partnership with limited liability, but so did the far more common commenda; and the essence of a joint-stock company does not consist in the principle of limited responsibility, but rather in the prolongation of the corporate exist-

[1] Lehmann, *Geschichtliche Entwickelung des Aktienrechts* (1895). *Das Recht der Aktiengesellschaften* (1898).

See Thaller, *La Société par Actions dans l'Ancienne France*, pp. 14, 15. Thaller, *Traité Élémentaire de Droit Commercial*, p. 163 note.

[2] Wagner, *Seerecht*, pp. 8, 9. Thaller, *Société par Action*, p. 15.

ence and organisation of the company beyond the life of its members and in the free negotiability of the shares.

Of greater influence were the public loans[1] raised by Italian cities during the 13th and following centuries. The loans were divided into shares (luoghi) and the names of the owners were registered in special books. The shares not only passed to the heirs in case of the owner's death, but could be freely bought and sold; and as negotiable shares, even though they cannot in any sense be regarded as shares in a commercial speculation, they showed the keen commercial mind of the Italian an expedient that might be adopted for raising capital for commercial as well as for military purposes. It was in Genoa that the first joint-stock companies arose. To cover the cost of the conquest of Chios and Phocaea (1346) a loan was raised by the Genoan state and as usual was divided into shares of 100 lires, and the shareholders were given the "dominium utile" of the conquered lands. This Colonial company, incorporated with the bank of St. George in 1513, continued to exploit the resources of the two islands until their conquest by the Turks in the 16th century. Far more important however was the founding of the great bank of St. George in 1407 when the various state loans were consolidated into a single state debt. As security for the interest the city granted important privileges to the holders of the new consolidated stock, which was divided into shares of 100 lires. The stockholders were granted the right (1408) to carry on banking business, and especially after 1453 the administration and exploitation of important Genoan colonies passed into their hands. The creditors of the Genoan state had become the shareholders of a great colonial company which ultimately governed and administered Corsica, Kaffa and the greater part of the foreign dominions of Genoa.[2]

Colonial expansion in England, France and Holland led, though much later, to the creation of companies similar to that of Genoa. The Compagnie des Iles d'Amérique, which seems to be the earliest example in France, was created in

[1] Pertile, II, i. pp. 508-510. Goldschmidt, 292.
[2] Pertile, II, i. p. 509.

1626 and was rapidly followed by others of the same type.[1] The Dutch East India Company (1602) was but little earlier. In England the East India Company[2] received a royal charter in the opening year of the 17th century. At first the company could hardly be considered as a joint-stock company; for in the early years of its history the voyages were separate and not necessarily permanent ventures of the subscribers, who contributed varying amounts to the capital required for the expedition and received a proportionate share of the proceeds when the expedition returned. A shareholder in one of the early expeditions might or might not be a shareholder in the next. In 1613 the first so-called joint-stock was subscribed; but the term is misleading; it was not a subscription of permanent capital. As late as the middle of the 17th century subscribers wished to carry on separate trade in ships of their own, but the company protested and in 1654 a decision of the council of state was given "in favour of joint-stock management and exclusive trading."

It would seem that joint-stock companies took their rise owing to colonial expansion in Italy at the close of the Middle Ages, and had spread to Holland, France and England by the 17th century. The history of the development[3] and of the gradual extension of this form of partnership from projects of colonisation to commercial undertakings of every kind and variety lies outside the scope of this essay. But it is interesting to note that that system of partnership that now controls most of the great commercial and industrial enterprises of modern life, that has popularised and democratised capital and enabled the savings of the people as a whole to be applied to commercial speculations, great and small, of every kind, and that has changed the whole nature of commercial finance, was in its origin the outcome of state necessities and of colonial expansion.

[1] Viollet, *op. cit.*, p. 767. Thaller, *Société par Actions*, p. 5, says "on ne doit pas remonter plus haut que le règne de Henri IV.": but he gives no example for this earlier date.

[2] Article on East India Company in Palgrave's *Dictionary of Political Economy*.

Levi, *History of British Commerce*, pp. 233, 337 and note.

[3] Especially interesting seems the combination of the commenda with the new form as seen in the *Commandite par actions*.

57. THE HISTORY OF THE LAW OF BUSINESS CORPORATIONS BEFORE 1800 [1]

By Samuel Williston [2]

I

THE most striking peculiarity found on first examination of the history of the law of business corporations is the fact that different kinds of corporations are treated without distinction, and, with few exceptions, as if the same rules were applicable to all alike. Subdivisions into special kinds are indeed made, but the classification is based on differences of fact rather than on differences in legal treatment. Thus, corporations are divided into sole and aggregate. Again, they are divided into ecclesiastical and lay, and lay corporations are again divided into eleemosynary and civil. But the division having been made, the older authors [3] proceed to treat them all together, now and then recording some minor peculiarity of a corporation sole or of an ecclesiastical corporation with one member capable.

Municipal and business corporations, so unlike according to modern ideas, are classed together as civil corporations, and treated together along with the rest. Yet the East India Company was chartered in 1600, and other trading

[1] This Essay was first published in the Harvard Law Review, 1888, vol. II, pp. 105-124, 149-166, and has been revised by the author for this Collection.

[2] Weld Professor of Law in Harvard University. A. B. 1882, A. M., LL. B. 1888, Harvard University; draftsman of acts on Bills of Sale, etc., for the National Conference of Commissioners on Uniform State Laws, 1905-1908.

Other Publications: Cases on Contracts, 1894; Cases on Sales, 2d ed. 1905; and various articles in law journals.

[3] *E. g.*, Coke, in Sutton's Hospital Case, 10 Rep. 1, The Law of Corporations, 1 Blacks. Com. ch. xviii., Kyd on Corporations.

companies had been chartered even earlier, and between 1600 and 1800 numerous corporations were chartered, having for their objects, trade, fishing, mining, insurance, and other business purposes. To understand how it was that the law of business corporations was so connected with that of other corporations, and how it gradually became distinguished, it is necessary to understand how such corporations grew up, and in what way they were regarded when first they came into existence.

The general idea of a corporation, a fictitious legal person, distinct from the actual persons who compose it, is very old. Blackstone ascribes to Numa Pompilius the honor of originating the idea.[1] Angell and Ames are of the opinion that it was known to the Greeks, and that the Romans borrowed it from them.[2] Sir Henry Maine, however, shows that primitive society was regarded by its members as made up of corporate bodies, that the units "were not individuals but groups of men united by the reality or the fiction of blood relationship," and that the family, clan, tribe, were recognized as distinct entities of society before individuals were.[3] It is not surprising, therefore, to find in the Roman law the conception of corporate unity early developed. Savigny, in whose treatise [4] may be found the best connected account of corporations in the Roman law, states that villages, towns, and colonies were the earliest. "But once established definitely for dependent towns, the institution of the legal person was extended little by little to cases for which one would hardly have thought of introducing it. Thus, it was applied to the old brotherhoods of priests and of artisans; then, by way of abstraction, to the State, which, under the name of *fiscus*, was treated as a person and placed within the jurisdiction of the court. Finally, to subjects of a purely ideal nature, such as gods and temples." Savigny then enumerates the different kinds of corporations among the Romans. The present subject is concerned with but one of these, — the business associations. "To this class belong the old cor-

[1] 1 Blacks. Com. 468.
[2] Angell and Ames on Corp. (1st ed.).
[3] Ancient Law (4th ed.), 183.
[4] System des heutigen römischen Rechts, vol. ii. § 86 *et seq.*

porations of artisans who always continued to exist, and of whom some, the blacksmiths, for example, had particular privileges; also new corporations, such as the bakers of Rome, and the boatmen at Rome and in the provinces. Their interests were of the same nature, and this served as the basis of their association, but each one worked, as to-day, on his own account."

"There were also business enterprises carried on in common and under the form of legal persons. They were ordinarily called *societates*. Their nature was, in general, purely contractual; they incurred obligations, and they were dissolved by the will as well as by the death of a single member. Some of them obtained the right of being a corporation, keeping always, however, the name of *societates*. Such were the associations for working mines, salt-works, and for collecting taxes." [1]

This latter kind of corporation seems never to have become sufficiently numerous or important to exert a definite influence on the law. Perhaps the Romans were not a sufficiently commercial people to develop the uses of business corporations. In common with other associations the authorization of the supreme power of the State was needed to constitute them legal persons, though this might be given by tacit recognition; [2] and the assent of the sovereign was equally necessary for dissolution. Three members were requisite for the formation of a corporation, though not for its continued existence. The rights and duties of the fictitious person corresponded closely to those of an actual person, so far as the nature of the case admitted. It could hold and deal with property, enjoy *usufructus*, incur obligations, and compel its members to contribute to the payment of its debts, inherit by succession either testamentary or by patronage, and take a legacy. Whether it could commit a tort was a disputed question.

[1] Savigny, System etc., § 88.

[2] Blackstone is, therefore, in error in saying (1 Com. 472) that by the civil law the voluntary association of the members was sufficient unless contrary to law — an error probably caused by the fact that penalties were imposed on certain forbidden associations in the nature of clubs for acting without the authorization of the State, and only on these.

After the introduction of Christianity the church found numerous applications in its own organization for the doctrines which had been developed in regard to corporations, and through the church and its officials these doctrines strongly influenced the law of England, where they were applied to the existing associations.

The earliest corporate associations in England seem to have been peace-guilds, the members of which were pledged to stand by each other for mutual protection.[1] Such brotherhoods would naturally be formed by neighbors or by those exercising similar occupations. From the tendency to associate on account of proximity of residence were developed municipal corporations; from the tendency to associate on account of similarity of occupation the craft guilds grew. These two classes of corporations were the earliest regularly chartered lay corporations in England. Both of them had their counterparts in the Roman law.[2] At first sight they do not seem to have much in common, but the ancient municipal corporation differed from its modern descendant. It was a real association, and membership could not be acquired simply by residing within the town limits. It exercised a minute supervision over the inhabitants, — among other things regulating trades. The guilds or companies did the same thing, only on a more restricted scale. They made by-laws governing their respective trades, which were not simply such regulations as a modern trade-union might make, since any one carrying on a trade, though not a member of the guild of that trade, was bound by its by-laws, so long as they were not opposed to the law of the land or to public policy as it was then conceived.[3] In short, the guilds exercised a power similar to that exercised by the municipal corporations, and, indeed, so late as the time of Henry VI. guildated and incorporated were synonymous terms.[4] Instead of having for its field all inhabitants of a

[1] See History of Guilds, Luigi Brentano.

[2] For an account of guilds at Rome see "Les Sociétés Ouvrières à Rome," 96 Rev. des Deux Mondes, 626, by Gaston Boissier.

[3] Butchers' Company *v.* Morey, 1 H. Bl. 370; Kirk *v.* Nowill, 1 T. R. 118.

[4] Madox, Firma Burgi, 29.

district and local legislation of every character, the guild was confined to such inhabitants of the district as carried on a certain trade and to regulations suitable for that trade. So far as that trade was concerned the right of government belonged to the guild.

The first trades to become organized in this way were naturally the manual employments necessary to provide the community with the most fundamental necessities of civilized life. The weavers were the earliest. They received a charter from Henry II., "with all the freedom they had in the time of Henry I." The goldsmiths were chartered in 1327, the mercers in 1373, the haberdashers in 1407, the fishmongers in 1433, the vintners in 1437, the merchant tailors in 1466.[1]

During the sixteenth century the growth of the commercial spirit, fostered by the recent discovery of the New World, the more thorough exploration of the Southern Atlantic and Indian Oceans, and the search for a North-west passage, led to the establishment and incorporation of companies of foreign adventurers, similar in all respects to the earlier guilds, except that their members were foreign instead of domestic traders. Among the earliest of these were the African Company, the Russia Company, and the Turkey Company.[2] The last two were called "regulated companies;" that is, the members had a monopoly of the trade to Russia and to Turkey, but each member traded on his own account.

A more famous company was chartered by Queen Elizabeth in 1600, under the name of the Company of Merchants of London, trading to the East Indies.[3] It had been found that the expense incident to fitting out ships for voyages, often taking several years for their completion, was too great to be borne easily by individual merchants, and it was one of the claims to favorable consideration which the East India Company put forward, that "noblemen, gentlemen, shopkeepers,

[1] 1 And. Hist. of Commerce, 250.
[2] Knight's Hist. of England, vol. v. 39.
[3] What follows in regard to the East India Company is based on "The History of European Commerce with India," by David Macpherson, London, 1812, and documents therein quoted.

widows, orphans, and all other subjects may be traders, and employ their capital in a joint stock."[1]

Sums of various amounts were subscribed, and the profits were to be distributed in the same proportions. This joint-stock adventure was not, however, identical with the corporation. Members of the corporation were not necessarily subscribers to the joint stock, and any member could, if he liked, carry on private trade with the Indies, — a privilege belonging exclusively to members. By the charter, apprentices and sons of members were to be admitted to membership in the same way as was customary in the guilds.

The East India Company was, therefore, in its early days, like the other trading companies, — an association of a class of merchants to which was given the monopoly of carrying on a particular trade, and the right to make regulations in regard to it. Till 1614 the joint stock was subscribed for each voyage separately, and at the end of the voyage was redivided. After that, for many years, the joint stock was subscribed for a longer or shorter term of years, and at the end of each term the old stock was usually taken at a valuation by the new subscribers. Membership in the corporation, however, soon became merely a formal matter, — useless, except to those interested in the joint stock, especially as regulations were passed forbidding other members from engaging in private trading ventures to India. After 1692 no private trading of any kind was allowed except to the captains and seamen of the Company's ships. The form, however, was still retained, and every purchaser of stock who was not a member of the Company was obliged to pay a fee of £5 for membership.

At this time (1692) there were but two other joint-stock companies of any importance in England, — the Royal African Company and the recently chartered[2] Hudson's Bay Company. The outline given above will serve to indicate their general nature and also to show how something like the modern joint-stock corporation grew out of the union

[1] From the defence of the Company in the Privy Council, 2 And. Hist. Com. 173.

[2] 1670.

of the ideas of association for the government of a particular trade by those who carried it on, and of combination of capital and mutual coöperation, suggested and made necessary by the great expense incident to carrying on trade with distant countries. But the corporation was far from being regarded as simply an organization for the more convenient prosecution of business. It was looked on as a public agency, to which had been confided the due regulation of foreign trade, just as the domestic trades were subject to the government of the guilds. In a little book, entitled "The Law of Corporations," published anonymously in 1702,[1] it is said: "The general intent and end of all civil incorporations is for better government, either general or special. The corporations for general government are those of cities and towns, mayor and citizens, mayor and burgesses, mayor and commonalty, etc. Special government is so called because it is remitted to the managers of particular things, as trade, charity, and the like, for government, whereof several companies and corporations for trade were erected, and several hospitals and houses for charity."[2]

This idea that the object of a business corporation is the public one of managing and ordering the trade in which it is engaged, as well as the private one of profit for its members, may also be noticed in the charters granted to new corporations, especially in the recitals, and in the provisions usually found that the newly chartered company shall have the exclusive control of the trade intrusted to it.

At the end of the seventeenth century the advantages of corporate enterprises seem to have been realized, and acts of Parliament, authorizing the king to grant charters to various business associations, were more frequent. In 1692 the Company of Merchants of London trading to Greenland was incorporated;[3] the act reciting the great importance of the Greenland trade, how it had fallen into the hands of

[1] This is the first English book wholly devoted to the subject of corporations; with the exception of a small volume by William Shepheard, published in 1659 in London, entitled: Law of Corporations, Fraternities, and Guilds.

[2] Law of Corporations, p. 2.

[3] 4 and 5 Wm. III., c. 17.

other nations, and could only be regained by a greater undertaking than would be possible for a private individual, and the consequent necessity of a joint-stock company. In 1694 the Bank of England received its first charter.[1] The act authorizing it was essentially a scheme to raise money for the government. Those who advanced money to the government were to receive a corresponding interest in the bank, the capital of which was to consist of the debt of the government. No other association of more than six persons was allowed to carry on a similar business.[2] Charters were also granted about this time to the National Land Bank,[3] the Royal Lustring Company,[4] the Company of Mine Adventurers,[5] the famous South Sea Company,[6] the Royal Exchange and the London (Marine) Assurance Companies.[7] In these charters also the public interest in having the undertaking prosecuted and the great expense incident thereto are mentioned. The capital of the South Sea Company, like that of the Bank, consisted of a debt due from the government on account of money loaned by private individuals.

The extravagant commercial speculations in joint-stock companies and the stock-jobbing in their shares which characterized the early part of the eighteenth century are well known. Anderson, in his "History of Commerce,"[8] enumerates upwards of two hundred companies formed about the year 1720, for the prosecution of every kind of enterprise, including one for the "Insurance and Improvement of Children's Fortunes," and another for "Making Salt Water Fresh." With very few exceptions, these companies were not incorporated, and in 1720 writs of *scire facias* were issued,[9] directing an inquiry as to their right to carry on business, in usurpation of corporate powers. This put a sudden end to many of these unfortunate ventures, and the

[1] 5 and 6 Wm. III., c. 31.
[2] By Stat. 6 Anne, c. 22, § 9.
[3] 7 and 8 Wm. III., c. 31.
[4] 9 and 10 Wm. III., c. 43.
[5] See 9 Anne, c. 24.
[6] 9 Anne, c. 21.
[7] 6 Geo. I., c. 18.
[8] 9 Vol. I, (1st ed.) 291 *et seq.*
[9] And. Hist. Com., Vol. II, 296.

consequent collapse of the enormously inflated public credit carried down others, so that only four of the long list were still in existence when Anderson wrote, — the York Buildings Company, the two Assurance Companies mentioned above, and the English Copper Company. The speculation in shares had been too great and the expectations of profit too extravagant not to cause a correspondingly great distrust in corporate enterprises when the bubble burst, and the profits realized were found to be small and extremely variable. Adam Smith, writing in 1776 was of opinion [1] that "the only trades which it seems possible for a joint-stock company to carry on successfully without an exclusive privilege, are those of which all the operations are capable of being reduced to what is called routine, or to such a uniformity of method as admits of little or no variation. Of this kind is, *first*, the banking trade; *secondly*, the trade of insurance from fire, and from sea risk and capture in time of war; *thirdly*, the trade of making and maintaining a navigable cut or canal; and, *fourthly*, the similar trade of bringing water for the supply of a great city." To render the establishment of a joint stock reasonable, however, the author says, two other circumstances should concur: first, "that the undertaking is of greater and more general utility than the greater part of common trades; and, secondly, that it requires a greater capital than can easily be collected into a private copartnery."

But during the latter part of the eighteenth century corporations were gradually increasing in number and importance. The need for them was felt in establishing canals, water-works, and, to some extent, in conducting the growing manufactures of the kingdom. The progress was indeed slow, and was destined to be so until the introduction of gas-lighting into all the larger cities and towns early in the present century, and later the laying of railways, created a widespread necessity for united capital.

The outline sketch just given of the growth of business corporations shows that they are not a spontaneous product, but are rather the result of a gradual development of earlier

[1] Wealth of Nations, book V, ch. I, art. 5.

institutions, running back farther than can be traced. It would be strange if signs of this development were not found in the history of the law relating to them. The natural expectation would be, and such is in fact the case, that as to the points which modern business corporations have in common with the early guilds and municipalities, the law relating to them dates back farther than almost any other branch of the law, while as to the points which belong exclusively to the conception of the business corporation, the law has been formed very largely since 1800. And not only had a body of new law to be thus formed, but old doctrines laid down by early judges as true of all corporations, though in reality suited only to the kinds of corporations then existing, had to be discarded or adapted to changed conditions.

In the first place, then, the endeavor will be to examine the points which belong essentially to every kind of corporation, and afterwards to consider what was settled before the present century in regard to the peculiar relations arising from the nature of a business corporation.

In the case of Sutton's Hospital,[1] decided in 1612, the general law of corporations was considered at some length, and the following things were said to be "of the essence of a corporation:[2] 1st, Lawful authority of incorporation, and that may be by four means, viz., by the common law, as the king himself, etc.; by authority of Parliament; by the king's charter; and by prescription. The 2d, which is of the essence of the incorporation, are persons to be incorporated, and that in two manners; viz., persons natural, or bodies incorporate and political. 3d, A name by which they are incorporated. 4th, Of a place, for without a place no incorporation can be made. 5th, By words sufficient in law, but not restrained to any certain, legal, and prescript form of words."

This, then, was the mould in which every corporation had to be cast, regardless of what might be its nature or its purpose.

The first requirement, due authorization, existed in the

[1] 10 Rep. 22 b.
[2] 10 Rep. 29 b.

Roman law as well as in the English.[1] But, since corporate bodies were recognized as facts from the earliest dawn of history, when the rule became recognized that the authority of the supreme power of the State was necessary for their formation, a theory had to be found to support the old associations, which had not been formed in accordance with the rule. This was done both in Roman and in English law by recognizing that a corporation could come into existence by prescription. It is safe to say, however, that prescriptive and common-law corporations were of the older forms only, and that for the formation of business corporations, from the first, a charter from the king directly or by authority of Parliament was necessary.

Originally the power was exercised exclusively by the king; but his power to grant charters allowing exemptions or monopolies was gradually restricted, like many of his other powers, as little by little the House of Commons assumed the entire effective control of the government. The regulated Russia Company received its charter from the crown in 1555 without the consent of Parliament; so did the East India Company in 1600, the Canary Company in 1665, the Hudson Bay Company in 1670. All of these companies were given monopolies. The rights of the Russia Company and of the East India Company were afterwards regulated by statute; and the patent of the Canary Company was soon withdrawn, though not before giving rise to a test case[2] on the validity of the monopoly, in which the court decided against it. The Hudson's Bay Company continued to enjoy its charter without interference, but its right to a monopoly held good so long only as nobody cared to dispute it. After the Revolution, no doubt, it was tacitly admitted that for the validity of a charter conferring a monopoly or other special privilege an act of Parliament was necessary, though for granting the simple franchise of acting as a corporation the patent of the king was sufficient.

The last of the requisites enumerated by Coke may be regarded as included within the first. "Lawful authority

[1] See *supra*, p. 196.
[2] Horne *v.* Ivy, 1 Ventr. 47.

of incorporation" must necessarily be given "by words sufficient in law." The necessity for persons to compose the corporation results from the nature of things rather than from any rule of law. Perhaps the same may be said of the importance of a name. As an actual person could hardly transact business or sue and be sued in the courts without a name, so the fictitious person of a corporation rests under a similar necessity. Possibly Coke meant something more, regarding a corporation as an abstraction which would have no existence without a name. "For a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law."[1] But if such was his view, it was not shared by his successors, when the tinge of scholasticism which colored all the law of the period faded away. In the case of the Dutch West India Company *v.* Van Moses,[2] decided in 1724, it was held that the action was well brought, though no certain name had been given the company by the Dutch States, the name being that by which it was usually called; and there are numerous cases to the effect that a technical misnomer of a corporation had even less effect than the misnomer of an individual.[3]

When Coke wrote, it seems to have been necessary that a corporation should be named as of a certain place.[4] This requirement, apparently so fanciful, is explained by the fact that the early corporations were almost all formed for local or special government of some kind, and it was consequently necessary to designate the place where the jurisdiction was to be exercised. The requisite must very early have become merely formal in case of certain classes of corporations, and might be fictitious. Thus, such names may be found as "The Hospital of St. Lazarus of Jerusalem in England" and "The Prior and Brothers of St. Mary of Mt. Carmel in England."[5] As the purpose for which corporations were

[1] Sutton's Hospital Case, 10 Rep. 32.

[2] 1 Stra. 612; and see the Law of Corporations, 13. Also, if the name of a corporation be changed, it retains its possessions, debts, etc. Bishop of Rochester's Case, Owen, 73; s. c. 2 And. 107; Luttrel's Case, 4 Rep. 87 b; Mayor of S. *v.* Butler, 3 Lev. 237; Haddock's Case, 1 Ventr. 355.

[3] 1 Kyd, 236 *et seq.*

[4] Button *v.* Wrightman, Cro. Eliz. 338.

[5] Rol. 512.

instituted became more varied, and the modes of thought of lawyers became more reasonable, less stress was laid on the formality under consideration. It is hardly mentioned in "The Law of Corporations" or in Blackstone's chapter.[1] Kyd merely says, "It is generally denominated of some place;"[2] and it may be assumed as true of business corporations, as well as of most others, that before the beginning of the present century there was no force in Coke's fifth essential for the existence of a corporation other than as a matter of convenience.[3]

Grant, now, that a corporation was legally called into being, what abilities and disabilities was it considered to have? Coke says:[4] "When a corporation is duly created all other incidents are tacitly annexed — . . . and therefore divers clauses subsequent in the charters are not of necessity, but only declaratory and might well be left out; as —

"1st. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, etc., and it need not, for it is an incident.

"2d. To sue and be sued, implead and be impleaded.

"3d. To have a seal; that is also declaratory, for when they are incorporated they may make or use what seal they will.

"4th. To restrain them from aliening or devising but in certain form; that is an ordinance testifying the king's desire, but it is but a precept and does not bind in law.

"5th. That the survivors shall be a corporation; that is a good clause to oust doubts and questions which might arise, the number being certain.

"6th. If the revenues increase, that they shall be used to increase the number of the poor, etc.; that is also explanatory.

"8th. To make ordinances; that is requisite for the good order and government of the poor, etc., but not to the essence of the incorporation.

[1] Blacks. Com. ch. xviii.
[2] 1 Kyd, 228.
[3] See Mayor of Stafford *v.* Bolton, 1 B. & P. 40.
[4] Sutton's Hospital Case, 10 Rep. 30, citing as authority 22 Edw. IV., Grants, 30.

"10th. The license to purchase in mortmain is necessary for the maintenance and support of the poor, for without revenues they cannot live, and without a license in mortmain they cannot lawfully purchase revenues, and yet that is not of the essence of the corporation, for the corporation is perfect without it."

This list of attributes laid down by Coke as necessarily belonging to all corporations is quoted with approval in "The Law of Corporations."[1] It is given by Blackstone in substance, though altered to the following form:[2] —

The incidents which are tacitly annexed to every corporation as soon as it is duly erected are —

"1st. To have perpetual succession. This is the very end of its incorporation, for there cannot be a succession forever without an incorporation, and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.

"2d. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may.

"3d. To purchase lands and hold them for the benefit of themselves and their successors, which two are consequential of the former.

"4th. To have a common seal. . . .

"5th. To make by-laws or private statutes for the better government of the corporation, which are binding on themselves, unless contrary to the law of the realm, and then they are void."

The enumeration of Blackstone is given without substantial alteration by Kyd,[3] though he adds that the last two powers are unnecessary for a corporation sole, and that the right to make by-laws is not inseparably incident to all kinds of corporations aggregate, for there are some to which rules may be prescribed; and, further, that the list is not exhaustive. The first three capacities are reducible to this, that the fictitious person of the corporation shall have, in general,

[1] P. 16.

[2] 1 Blackst. Com. 475; also in Wood's Inst. of the Laws of Eng., bk. I, ch. VIII.

[3] Vol. i. p. 69.

the capacity of acting as an actual person, so far as the nature of the case admits. Such must have been the recognized law ever since corporations, as we understand the word, existed; for the conception of a corporation as a legal person, a conception going back farther than can be definitely traced, involves necessarily the consequence that before the law the corporation shall be treated like any other person. To this consequence there is a necessary exception in regard to such rights and duties as require an actual person for their subject.

The right and the necessity of having a corporate seal was probably in its origin simply the result of treating a corporation in the same way as an individual. The great antiquity of the custom of using seals is well known. It prevailed among the Jews and Persians,[1] as well as among the Romans. It was spread over all the countries whose systems of law were borrowed from the Romans, and it was introduced into England by the Normans.[2]

In England, owing to the generally prevailing illiteracy, the use of the seal became the ordinary way of indicating the maker of a charter. The practice, apparently, was not the result of a desire for peculiar solemnity, but merely for identification. The use and object of a corporate seal may be assumed to have been the same as of an individual seal. It is true that Blackstone[3] finds a reason for its use in the fact that "a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal." But this reason, besides bearing on its face indications of having been invented after the fact, goes altogether too far. A corporation has no hand with which to affix its seal, and if it may perform that act by an agent, there is no reason in the nature of things why it should not do anything else by the same instrumentality.[4] And in the Roman law the use

[1] 2 Blackst. Com. 305; Genesis, xxxviii. 18; Esther, viii. 8; Jeremiah, xxxii. 10.
[2] 2 Blackst. Com. 306.
[3] 1 Com. 475.
[4] 1 Blackst. Com. (Sharswood's ed.) 475, n. 7.

of a common seal was only a possible, not a necessary, way for a corporation to act.

When writing became a general accomplishment, the use of a seal for private documents was reserved for instruments of a peculiarly formal or solemn character. That a similar transition did not take place in the use of the seal of a corporation may be ascribed to the natural conservatism of a number of men acting in a body, and to the fact that from the character of early corporations the inconvenience of sealing all corporate contracts was not likely to be felt. However this may be, it was a rule of law well settled before business corporations came into existence that a corporation could only act by deed under its common seal. To the rule some slight exceptions were allowed, but only in few cases. Such a restriction could not fail to be extremely embarrassing to corporations, when they afterwards sprang up, the object of which was to carry on trade; and the development of the law on this point in regard to such corporations shows not so much a growth of legal doctrine, as an endeavor to do away with the inconvenient restraint imposed on all aggregate corporations, which had its origin when guilds and municipal and ecclesiastical associations were the only corporate bodies, — an endeavor that met with but indifferent success.[1]

The general rule seems to have been well settled in the fifteenth century, and it also appears that there were some slight exceptions to it.[2] Just what these were, was by no means definitely marked out. In Y. B. 4 Hy. VII. 17 b, one of the judges, Townsend, said: "A body corporate cannot make a feoffment or lease or anything relating to their inheritance without deed, but of offices and things which pertain to servants they can. For they can appoint plowmen and servants of husbandry without deed, and butlers and cooks and things of that kind, and can depute their servants to do anything without deed. They can do this because it is not in disinheritance of the corporation, but only by way of service, and it is the common course to justify by com-

[1] Taylor on Evidence (8th ed.), § 976 *et seq.*
[2] Y. Bks. 9 Edw. IV. 39, 4 Hy. VII. 17 b, 7 Hy. VII. 9.

mand of the body corporate, and not show anything from it." Brian, however, was of a contrary opinion, saying, "A body corporate can do none of those things without deed." Townsend's opinion undoubtedly made more sweeping exceptions than were afterwards allowed, but his statement that a corporation could appoint a cook or butler without a deed was for centuries cited as indicating the extent of the power of acting without using the corporate seal.[1] In Y. B. 7 Hy. VII. 9, it was held that the defendant in an action of trespass could not justify as acting for a corporation without showing authority by deed. Wood adds: "But of little things the law is otherwise, for it would be infinite if each little act was by deed, as, a command to their servants, to light a candle in church, or to make a fire, or such things." With this the court with one exception agreed. This statement of the law is based on a principle which continued to be decisive in the eighteenth as in the sixteenth century. In transactions which from their nature could be done under seal only with great inconvenience, the formality of sealing was dispensed with. The inconvenience might arise from the pettiness of the act, or from its being of every-day occurrence and necessity, or from the importance of immediate action. The exception was wrested by common sense from the scope of the rule.

Accordingly, when business corporations arose, it must have been tacitly admitted that the daily business need not all be transacted under seal. For instance, the bills of the Bank and of the East India Company were never sealed. The right to make such bills was afterward defended and explained as necessarily implied in the powers given them by Parliament. These corporations "could not carry on their business without the making of such instruments, and they would cease to be bills or notes if under seal. It is clear, however, that this indulgence is not allowed by law to be extended beyond cases of absolute necessity."[2]

A more difficult point was raised in 1717, in the case of

[1] Horne *v.* Ivy, 1 Vent. 47; Dunston *v.* Imp. Gas Co., 3 B. & Ad. 125, 129; Tilson *v.* Warwick Gas Co., 4 B. & C. 962, 964.

[2] East London Waterworks Co. *v.* Bailey, 12 Moore, 532; s. c. 4 Bing. 283; and see Edie *v.* E. I. Co., 2 Burr. 1216, where assumpsit was brought against the Company on a bill of exchange, without objection.

Rex *v.* Bigg,[1] the leading case before the present century on the extent to which a business corporation could act without the use of its seal. Bigg was charged with felony in altering a bank-note signed by one Adams, an officer of the bank. It was objected that Adams did not have authority under the seal of the bank to affix his name, and that consequently the altered instrument was not a valid obligation, and the prisoner was not guilty of forgery. The argument of Peere Williams for the prisoner is fully given, and the cases which he cites seem to bear him out in his contention that such an agent could not be appointed without deed; but a majority of the Court held the prisoner guilty of felony. No opinion is given. It must be admitted that the decision involved some extension of the old rule that a cook or butler or servant for some petty purpose could be retained without a sealed instrument, but after this the law was settled that the regular servants and agents of a business corporation were to be regarded in a similar way.[2]

But, granting this, how far could an agent of such a corporation act in its behalf without a deed? As mentioned above, a corporation, the charter of which authorized it to carry on a business that required for its proper exercise the issue of bills and notes, did not need to affix the common seal to such obligations. Undoubtedly, also, a large amount of routine business was transacted entirely by parol, and there is no case reported where a transaction executed on both sides was set aside because the corporation did not act by deed. But, for the rest, it may at least be said that till after the first quarter of the present century had passed, no unsealed executory contract was binding on either party;[3] and it is probable, also, that in a partially executed transaction no special agreement was valid without seal. On the other hand, if the transaction was such as of itself gave rise to an obligation, it could be enforced; forfeitures and tolls could be recovered in assumpsit;[4] if land were demised with-

[1] 3 P. Wms. 419.
[2] Bac. Abr., tit. Corporation (E) 3; 1 Kyd on Corp. 26.
[3] East London Waterworks *v.* Bailey, 12 Moore, 532; s. c. 4 Bing. 283.
[4] The Barber Surgeons *v.* Pelson, 2 Lev. 252; Mayor of London *v.* Hunt, 3 Lev. 37; and see Parbury *v.* Bank of England, 2 Doug. 524,

out deed, and the lessee occupied the premises, he was liable for rent in an action for use and occupation; and similarly, no doubt, if goods were bought or sold by a corporation and delivery was made, the vendee could have been forced to return or pay for them.[1]

The courts were sometimes able to mitigate the hardships which followed from the necessity of doing everything under seal, by presuming, as a matter of pleading, that when performance by a corporation was averred, performance with all necessary formalities was intended,[2] and partial relief was given in special instances by act of Parliament;[3] but at best it would be hard to find a more striking instance of a rule of law which arose from the customs prevailing in an entirely different state of society still maintaining itself when every reason for its existence had ceased, and its only effect was to produce injustice.

The right to pass by-laws for the regulation of their affairs belonged to corporations in the Roman law[4] from a very early period, and also in the English law. Indeed, the right is a consequence almost necessarily following from the nature of the early corporations. Institutions to which were delegated powers of government, whether ecclesiastical or secular, whether exercised over all within a certain locality or confined to those practising a particular trade, must have been allowed appropriate means of exerting their authority, and the scope of the by-laws must have been proportioned to the jurisdiction. Thus, the by-laws of a corporate town were binding on any one who came within its limits.[5] The by-laws of a guild were binding not on its members only, but on such outsiders as exercised the trade which the guild

where, at the suggestion of Lord Mansfield, a special action of assumpsit was brought on account of the bank's refusal to transfer stock on the books.

[1] E. I. Co. *v.* Glover, 1 Stra. 612.

[2] Edgar *v.* Sorell, Cro. Car. 169; Tilson *v.* Warwick Gas Co., 4 B. & C. 962; Rex *v.* Bigg, 3 P. Wms. 419.

[3] *E. g.*, 11 Geo. I. c. 30, § 43, which allowed the two insurance companies recently chartered to make use of the freer pleading in vogue in the action of assumpsit when sued on their policies, which were under seal.

[4] Dig. xlvii. 22, lex 4.

[5] Cuddon *v.* Eastwick, 1 Salk. 193, pl. 5.

governed and regulated.[1] The power of making by-laws would be useless without means of enforcing them, and the imposition of penalties for failure to comply with its by-laws was within the power of a corporation, from an indefinite time.[2] The farther back the examination is carried the broader seems to have been the power of punishing the refractory, extending by special charter in many cases to imprisonment as well as fine.[3] By Coke's time, however, it was settled that the power of imprisonment could not be given by letters-patent from the king, but required an act of Parliament;[4] and it was further held that similar authority was needed for a by-law affixing as a penalty the forfeiture of goods;[5] but that such by-laws were formally valid may be inferred from the fact that this mode of enforcement was sometimes supported as being in accordance with an immemorial custom.[6] Further limitations on the power of making by-laws, which were more strictly construed as time went on, were that they must not be contrary, nor even cumulative, to the statutes of Parliament,[7] nor in restraint of trade,[8] nor unreasonable.[9] Business corporations, when they arose, were dealt with according to the same principles. As it was well recognized that such by-laws only could be made as were in harmony with the objects for which the corporation was created,[10] and as the purposes for which business corporations were chartered were as a rule definitely marked out, the scope of the right to make by-laws was correspondingly narrowed. A few of the earlier joint-stock companies were intrusted with the regulation of the trade in which they were engaged, and the by-laws of these were binding on all engaged in the trade, precisely as was the case with guilds.[11] But by the

[1] Butchers' Co. *v.* Morey, 1 H. Bl. 370; Kirk *v.* Nowill, 1 T. R. 118.
[2] The Law of Corp. 209.
[3] Grant on Corp. 86, especially notes d and f.
[4] Towle's Case, Cro. Car. 582; Chancey's Case, 12 Rep. 83.
[5] 8 Rep. 125 a; Horne *v.* Ivy, 1 Ventr. 47; Clarke *v.* Tuckett, 2 Ventr. 183; Nightingale *v.* Bridges, 1 Show. 135.
[6] Clearywalk *v.* Constable, Cro. Eliz. 110; Sams *v.* Foster, Cro. Eliz. 352; s. c. Dyer, 297 b.
[7] Grant on Corp. 78.
[8] Ibid. 83. [9] Ibid. 80.
[10] Child *v.* Hudson's Bay Co., 2 P. Wms. 207; 2 Kyd on Corp. 102.
[11] *E. g.*, the East India Company in its early days regulated the right of private trading with the Indies, and soon forbade it altogether. It

change in the conception of a corporation from an institution for special government to a simple instrumentality for carrying on a large business, the right to pass by-laws was restricted to regulations for the management of the corporate business.[1] Such regulations, of course, like the by-laws of municipal corporations and guilds, were void if contrary to statutory or common law, or if unreasonable. Whether a certain by-law was held unreasonable or not depended in some measure on the discretion of the court. The decision might be different when judged by the standards of the eighteenth century from what it would be if judged by modern standards. Thus, a by-law of the Hudson's Bay Company giving itself a lien on its members' stock for any indebtedness due from them to the Company was held valid,[2] the Court saying, "All by-laws for the benefit and advantage of trade are good unless such by-laws be unreasonable or unjust; that this, in their opinion, was neither." To-day, in a jurisdiction unfettered by authority, the conclusion would probably be otherwise.[3]

In addition to the doctrines which have just been considered, a few others may be mentioned as applicable to all corporations alike. In general, questions of rights and duties towards the outside world are much the same for all kinds of corporations. The law, it is said, makes no personal distinctions, and it is at least true that wherever considered practicable the fictitious legal person of a corporation, whatever its nature, was treated by the law in the same way as an actual person. On the other hand, the law regulating the relations of the members to each other and to the united body

endeavored to enforce this rule against a non-member by forfeiture of his vessel. He petitioned the House of Lords, which ordered the Company to put in its answer. The case finally resulted in a quarrel between the Lords and the Commons as to the right of the former to take jurisdiction. The Lords gave judgment for the plaintiff, but it was never executed. Macpherson, Hist. 127. See, also, Horne *v.* Ivy, 1 Ventr. 47.

Further illustrations of by-laws of business corporations binding on the public may be found in the regulations passed by early canal and railway companies in accordance with 6 Geo. IV. c. 71, and 8 and 9 Vict. c. 20, § 109.

[1] Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

[2] Child *v.* Hudson's Bay Co., 2 P. Wms. 207, re-argued *sub nom.* Gibson *v.* Hudson's Bay Co., 1 Stra. 645; s. c. 7 Vin. Abr. 125.

[3] Lowell, Transfer of Stock, § 166.

must differ according to the nature and objects of the corporation.

It has often been questioned whether a corporation could commit a tort or crime. The better opinion in the Roman law seems to have been that the question should be answered in the negative, at least whenever *dolus* or *culpa* was necessary to make the act under consideration wrongful.[1] In England, however, it was very early held that corporations might be liable in actions on the case or in trespass,[2] and afterwards in trover.[3] But it is not likely that a corporate body would have been held liable for any tort of which actual malice or *dolus* was an essential part. Similarly it was held that a corporation could not be guilty of a true crime,[4] that is, it could not have a criminal intent, but it could be indicted for a nuisance or for breach of a prescriptive or statutory duty, and, in general, where only the remedy was criminal in its nature.[5]

It was generally laid down that a corporation could not hold in trust.[6] It is not very clear exactly on what reasoning the conclusion was based. There is very little to support it, except in very old cases. The view gradually became obsolete, and though there was no decision before the year 1800 definitely deciding the point, it is probable that it was recognized before that time that a corporation might hold in trust.[7]

II

The fundamental difference in the constitution of business corporations from the earlier forms which preceded them is the joint-stock capital, and most of the law peculiar to this class of corporations relates to that difference, and the conse-

[1] Savigny, System, §§ 94, 95.

[2] See Grant on Corp. 277, 278, and notes, in which are cited many cases from the Year Books.

[3] Yarborough *v.* Bank of England, 16 East, 6.

[4] Anon., 12 Mod. 559; that it cannot commit treason see Vin. Abr., Corpor. Z, pl. 2.

[5] Grant on Corp. 283, 284.

[6] The authorities are collected in Gilbert on Uses, 5, 170, and Sugden's note.

[7] See Atty.-Gen. *v.* Stafford, Barnard. Ch. 33.

quences which follow from it. From motives of convenience it early became customary to divide the joint stock into shares of definite amounts. The nature of the interest which it was conceived the holders of such shares possessed, and their rights and duties among themselves and against the corporation, so far as these were settled or discussed by the courts before the nineteenth century, will now be treated.

The most accurate definition of the nature of the property acquired by the purchase of a share of stock in a corporation is that it is a fraction of all the rights and duties of the stockholders composing the corporation.[1] Such does not seem to have been the clearly recognized view till after the beginning of the nineteenth century. The old idea was rather that the corporation held all its property strictly as a trustee, and that the shareholders were, strictly speaking, *cestuis que trust*, being in equity co-owners of the corporate property.[2]

There are several classes of cases illustrating this difference in theory. Thus, if the shareholders have in equity the same interest which the corporation has at law, a share will be real estate or personalty, according as the corporate property is real or personal. If it were personalty, as was usually the case, no question would arise, for then on any view the shares would be personalty likewise. Let it be supposed, however, that the corporate property was real estate; then, according to the view formerly prevailing, the shares must be devised and transferred according to the statutes regulating the disposition of real estate; they would be subject to the land tax; and, in short, would have to be dealt with in the same way as other equitable interests in land. Exceptions to this general rule would have to be made if special modes of transfer were prescribed by a statute of incorporation. This was generally the case; provision was ordinarily made that the title to shares should pass by transfer on the books, and also that they should be personal property.

[1] Lowell, Transfer of Stock, § 4.

[2] "The legal interest of all the stock is in the company, who are trustees for the several members." *Per* Lord Macclesfield, Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

The question arose several times in regard to the shares of the New River Water Company. The title to the real estate controlled by the company seems to have been in the individual shareholders, the company (which was incorporated) having only the management of the business.[1] It was uniformly held that the shares were real estate, that they must be conveyed as such *inter vivos*, that a will devising them must be witnessed in the same manner as a will devising other real estate,[2] and that the heir and not the personal representative of a deceased owner was entitled to shares not devised.

The cases which were thus decided were afterwards distinguished[3] on the ground that the title to a large part of the real estate was in the corporators, and as to all of it the company had no power to convert it into any other sort of property, but had simply the power of managing it. The distinction, however, amounts to nothing. If the individual proprietors owned the land and the company controlled it, the proprietors had two distinct kinds of property. One was real estate, and the fact that it was occupied by a corporation was immaterial; the other was personalty, consisting of the bundle of rights belonging to the shareholders in any corporate company. Moreover, the decisions do not indicate that they were based on such a distinction.[4] It was not until the decision of Bligh *v.* Brent,[5] in 1836, that the modern view was established in England. The contention of the counsel for the plaintiff in that case, that the company held the corporate property as a trustee, and that the interest of the *cestui que trust* was coextensive with the legal interest of the trustee, was well warranted by the decisions which he brought forward to sustain it. Indeed, the greater part of the argument for the defendant admitted this, but contended that real

[1] As to the nature of the company see Bligh *v.* Brent, 2 Y. & C. 268.

[2] Drybutter *v.* Bartholomew, 2 P. Wms. 127; Townsend *v.* Ash, 3 Atk. 336; Stafford *v.* Buckley, 2 Ves. Sr. 171, 182; Swaine *v.* Falconer, Show. P. C. 207; Sandys *v.* Sibthorpe, 2 Dick. 545.

[3] Bligh *v.* Brent, 2 Y. & C. 268, 296.

[4] See further, Howse *v.* Chapman, 4 Ves. 542, where a share in the Bath navigation was held to be real estate, and also Buckeridge *v.* Ingram, 2 Ves. 652, as to the Avon navigation. The latter company was not, it is true, incorporated, but the decision is not based on that distinction.

[5] 2 Y. & C. 268.

estate held by a corporation for trading purposes should be treated as personalty, like that similarly held by a partnership.[1]

It is true that it was decided in 1781, in Weekley *v.* Weekley,[2] that shares in the Chelsea Water Works were personalty; but no reasons are given for the decision, and it may have been based on the facts that a large part of the property of the company was personalty,[3] and that the shares were generally considered personalty, and dealt with as such. Otherwise the case seems inconsistent with the cases and reasoning previously alluded to.

In the case of the King *v.* The Dock Company of Hull[4] an attempt was made to apply conversely the principle that the property of a corporation and of its individual corporators is the same, except that the interest of the former is legal, of the latter, equitable. The act under which the company was formed[5] declared that the shares of the proprietors should be considered as personal property. It was argued that this made the real estate of the corporation personalty, and hence not subject to the land tax. The Court overruled the objection, not on the ground that the property of the corporation was entirely different from that of the shareholders, but because, "as between the heir and executor, this (the real estate of the company) is to be considered as personal property, but the Legislature did not intend to alter the nature of it in any other respect."

Another class of cases illustrating the theory now under consideration arose from the transfer of stock on the books of the company by fraud or mistake without the consent of the owner. When it is understood that the right of a shareholder is a legal right, it is obvious that such a transfer

[1] In Wells *v.* Cowles, 2 Conn. 567, it was decided that turnpike shares were real estate. The argument was almost wholly confined to the question whether the property of the company was real estate or not. It was very summarily remarked that the property of the individual shareholders was of the same nature as that of the company.

[2] 2 Y. & C. 281, note.

[3] It was said in Bligh *v.* Brent, *supra*, that five-sixths of the property of the company was personalty.

[4] 1 T. R. 219.

[5] 14 Geo. III. c. 56.

cannot affect his rights unless he is estopped to assert them.[1] If, however, the legal interest is in the corporation, and the right of a shareholder is only equitable, the transferee, in the case supposed, will acquire title, though perhaps he may not be allowed to retain it. The latter view was taken in all the cases which arose prior to the year 1800. One of the earliest of them was Hildyard *v.* The South Sea Company and Keate.[2] The plaintiff's stock had been transferred to Keate, an innocent purchaser, under a forged power of attorney. The court decided that the plaintiff was entitled to relief, and that the loss must fall on Keate. Apparently the Court was of opinion, however, that until relief was given Keate was the actual stockholder, and not the plaintiff. Thus, it is assumed that the dividends which Keate had received were the dividends on the plaintiff's stock, and that they must be recovered at the suit of the plaintiff, not of the company. Further, the company is directed to "take this stock from the defendant Keate and restore it to the plaintiff." The case was afterwards overruled,[3] but in a way which served rather to emphasize the theory that the legal title to all the stock of a corporation is in the corporation itself.[4]

In Harrison *v.* Pryse[5] the facts were substantially the same, except that the defendant was not a purchaser for value. The company was not made a party. The plaintiff recovered the full value of his stock on the theory that it had been converted. The transfer on the books of the company, though without the plaintiff's authority, was assumed to have divested him of his stock. Lord Hardwicke, who decided the case, was of opinion that in case the estate of the defendant proved insufficient to satisfy the plaintiff's claim the company might be liable. "His reason was that the company must be considered as trustees for the owner at the time he purchased this stock, and as the stock had not been transferred with any privity of his, they must be considered as continuing his trustees."

[1] For a careful exposition of the modern view see Lowell, Transfer of Stock.

[2] 2 P. Wms. 76 (1722). [3] Ashby *v.* Blackwell, Ambl. 503.

[4] See also Monk *v.* Graham, 8 Mod. 9.

[5] Barnard. Ch. 324 (1740).

The last and most explicit of this series of cases was decided by Lord Worthington in 1765.[1] The facts were the same as in Hildyard *v.* The South Sea Company.[2] It was admitted that the plaintiff was entitled to relief, and the only question was which of the defendants should bear the loss. It was decided that it must fall on the bank. The reason given was that "a trustee, whether a private person or body corporate, must see to the reality of the authority empowering them (*sic*) to dispose of the trust money." Again, it is said by the Chancellor, "I consider the admission and acceptance of the transfer as the title of the purchaser."

Whether a contract for the sale of stock was a contract for the sale of goods, wares, or merchandise, within section 17 of the Statute of Frauds, is a question which was several times considered but not definitely decided in the eighteenth century. In Pickering *v.* Appleby [3] the judges were divided six to six as to whether a contract for the sale of ten shares of the Company of the Copper Mines required a memorandum in writing to make it enforceable. In other cases,[4] also, the point came up, but they went off on other grounds.

Whether specific performance could be had of such a contract is another question which was raised in the early part of the eighteenth century, because of the enormous fluctuations in prices at that time.[5] The earliest case was Cud *v.* Rutter,[6] decided in 1719. Sir Joseph Jekyll decreed specific performance of a contract for the sale of South Sea stock, and Lord Chancellor Parker overruled the decree, his chief reason being, "Because there is no difference between this

[1] Ashby *v.* Blackwell and The Million Bank, Ambl. 503.

[2] 2 P. Wms. 76.

[3] 1 Com. 354, referred to in Colt *v.* Netterville, 2 P. Wms. 304, 308.

[4] Colt *v.* Netterville, 2 P. Wms. 304; Mussell *v.* Cooke, Prec. in Ch. 533. In this last case the court seemed of opinion that a memorandum was necessary.

[5] Caused by the expected vast profits of the South Sea Company and other "bubbles," and the subsequent collapse of these speculations.

[6] 1 P. Wms. 570; *sub nom.* Cuddee *v.* Rutter, 5 Vin. Abr. 538, pl. 21; *sub nom.* Scould *v.* Butter, 2 Eq. Cas. Abr. 18, pl. 8.

In Gardener *v.* Pullen, 2 Vern. 394; s. c. Eq. Cas. Abr. 26, pl. 4, which was a bill to be relieved from the penalty of a bond conditioned to be void on the transfer of certain East India stock, the Court refused to relieve unless the stock was transferred; and to the same effect is Thompson *v.* Harcourt, 2 Bro. Par. Cas. 415.

£1,000 South Sea stock and £1,000 stock which the plaintiff might have bought of any other person upon the very day." [1]

There is nothing to indicate that any distinction was supposed to exist between South Sea stock, which was government stock with certain additional rights, and shares in ordinary companies. Moreover, two years later Lord Macclesfield dismissed a bill for specific performance of a contract for the sale of £1,000 stock in the York Buildings Company, which was an ordinary joint-stock corporation, on the ground that the proper remedy was at law.[2]

The only foundation afforded before the year 1800 for the view now prevailing in England,[3] that contracts for the sale of shares, as distinguished from government stock, will be specifically performed, is the case of Colt *v.* Netterville,[4] a bill for specific performance of a contract for the transfer of York Buildings stock, which was demurred to. Lord King overruled the demurrer, saying that the case might be "attended with such circumstances that may make it just to decree the defendant either to transfer the stock according to the express agreement, or at least to pay the difference." This, however, is altogether too indefinite to be regarded as disapproval of the previous cases, and it may be confidently stated that the former rule on this point in England was the same as that now prevailing in this country;[5] that is, in the absence of special circumstances, such contracts will not be specifically enforced.[6]

Though the corporation was looked upon as a trustee and the shareholders as *cestuis que trust*, it was of course perfectly

[1] See also, to the same effect, Cappur *v.* Harrison, Bunb. 135; Nutbrown *v.* Thornton, 10 Ves. 159.

[2] Dorison *v.* Westbrook, 5 Vin. Abr. 540, pl. 22.

[3] See Fry on Spec. Perf., part vi. ch. 1.

[4] 2 P. Wms. 304.

[5] Morawetz, Corp. (2d ed.) § 218.

[6] It was, indeed, said by Lord Eldon in Nutbrown *v.* Thornton, 10 Ves. 159, after he had remarked that it was perfectly settled that the Court would not decree specific performance of an agreement to transfer stock, "In a book I have of Mr. Brown's, I see Lord Hardwicke did that;" but there is no record of any such decision by Lord Hardwicke, and further, there is an express dictum by him to the contrary in Buxton *v.* Lister, 3 Atk. 383.

well recognized that there were rights and obligations not incident to an ordinary trust.

The practice of keeping books to record the transfer of stock was adopted by the East India Company, perhaps from its inception, and transfer on the books was regarded as essential for passing the title. Thus in 1679, in a suit for an account against a fraudulent assignee of East India stock, the company being joined,[1] the Court decree that the company "do, upon application made to them, according to their custom, transfer back the said £150 stock to the plaintiff;" and it was customary to insert in the early charters incorporating business associations, a provision that the shares might be assigned by entry in a book kept for that purpose.[2] Therefore, one of the earliest well-recognized rights of a shareholder was to have his name kept upon the transfer book so long as he held stock;[3] and, in consequence of the assignability of shares, to have the name of his assignee substituted, if he parted with his interest.[4] It follows that if the company transferred stock, however innocently, without due authority from the owner, it was liable. Several cases arose of such transfers, where the company acted in compliance with a forged power of attorney.

In all these cases,[5] it seems to have been decided or assumed that the company was bound to reinstate the original owner on its books, as well as to pay him the dividends that had accrued, though the reasoning on which these decisions were based was influenced by the notion previously adverted to, that the shareholder occupied the position of a *cestui que trust*.

When shares were held in trust, of course, it was the name of the trustee which appeared upon the books; he and not the beneficial owner was entitled to all the rights of a share-

[1] Cas. temp. Finch, 430.

[2] See, *e. g.*, in the case of the Greenland Company, 4 and 5 Wm. & M. c. 17, s. xxiv., in the case of the Bank of England, 5 and 6 Wm. & M. c. 20, s. xxv., in the case of the Nat. Land Bank, 7 and 8 Wm. III., c. 31, s. xvii.

[3] Bank of Eng. *v.* Moffatt, 3 Bro. C. C. 160; Johnson *v.* E. I. Co., Cas. temp. Finch, 430.

[4] Cock *v.* Goodfellow, 10 Mod. 489, 498, 20 Vin. Abr. 5, pl. 16.

[5] See *supra*.

holder.[1] This was fully recognized by the Courts; and not only this, but it was laid down that the company, after express notice that stock was held in trust, was at liberty to ignore the fact, even so far as to allow the trustee to commit a fraud on the *cestui que trust* unless the trust appeared on the books.[2] The right to such complete disregard of equitable interests rested perhaps not so much on decisions as on dicta which may be attributed to a careless over-emphasis of the fact that the legal interest, and, in general, the entire control of stock held in trust, is in the trustee.

In case of refusal by the officers of a company to transfer on the books at the request of the owner of stock, the proper remedy was not wholly clear in the eighteenth century. In the case of King *v.* Douglass [3] an application was made for a mandamus to compel a transfer. Lord Mansfield refused to allow this extraordinary remedy, and suggested a special action of assumpsit, and probably that action would have been held proper. Whether specific performance of the obligation would be enforced by equity was not suggested, but it is not unlikely that such a remedy would have been allowed.[4]

The right of a shareholder to vote at the election of officers, and in regard to by-laws for the management of a business corporation, was formerly precisely analogous to the similar right necessarily possessed by the members of all corporations from their origin, such as the members of a municipal corporation, for instance, still possess. That is, each shareholder was entitled to one vote if given by him in person. This was at first the rule in the East India Company, but, naturally enough, it soon became distasteful to the larger owners, and various changes were made at different times; for example, that only holders of £500 stock should have the right to vote, the smaller holders being allowed to pool their stock to make up the necessary amounts.[5]

[1] Stockdale *v.* South Sea Co. 1 Atk. 140; s. c. Barnard. Ch. 363; Hartga *v.* Bank of England, 3 Ves. 55; Bank of England *v.* Parsons, 5 Ves. 664.

[2] Stockdale *v.* South Sea Co. 1 Atk. 140; s. c. Barnard. Ch. 363.

[3] 2 Doug. 524.

[4] See Meliorucchi *v.* Royal Exchange Ass. Co., 1 Eq. Cas. Abr. 8, pl. 8; Gibson *v.* Hudson's Bay Company, 1 Str. 645.

[5] Macpherson, Hist. of Com. 125.

This was simply a restriction of the suffrage. The units of which the corporation was composed were still considered to be the members, as is the case in municipal corporations and guilds, — not shares, as is the case in the modern joint-stock corporation. The gradual progress from the old view to the modern one is shown by the changes in the power of voting. It soon became usual to allow the larger holder more than one vote, and it was customarily provided in the charters how many votes should belong to the owner of a given number of shares, the owner of a large number having more votes than the owner of a few, but not proportionately more. Thus, in the Greenland Company, each subscriber of £500 had one vote, each subscriber of £1,000 or more had two votes, and in no case could a shareholder have a greater number, however great his holding might be;[1] and in other charters are similar provisions. Except for some such provision, no doubt, each shareholder would have been entitled to but one vote. It did not take very great ingenuity to devise a plan by which owners of large amounts of stock could, in effect, secure a number of votes in proportion to their holdings. All that was necessary was to make temporary transfers of stock to a number of friends, — a practice called "splitting stock." The preamble of an act passed in 1766[2] shows the custom at that time. It recites "certain publick companies or corporations have been instituted for the purpose of carrying on particular trades or dealings with joint stock, and the management of the affairs of such companies has been vested in their general courts, in which every member of each company possessed of such share in the stock as by the charter is limited, is qualified to give a vote or votes;" and it is further recited that "of late years a most unfair and mischievous practice has been introduced, of splitting large quantities of stock, and making separate and temporary conveyances of the parts thereof for the purpose of multiplying or making occasional votes immediately before the time of declaring a dividend, of choosing directors, or of deciding any other important question, which practice

[1] 4 and 5 Wm. & M., c. 17, s. xvii.
[2] 7 Geo. III., c. 48.

is subversive of every principle upon which the establishment of such general courts is founded, and if suffered to become general, would leave the permanent welfare of such companies liable at all times to be sacrificed to the partial and interested views of a few." It is then provided by the act that in future members who have not held their stock for at least six months shall not vote.

As an instance of the conservatism of the English law in matters of form it may be mentioned that by the English Companies Act of 1862 the votes of shareholders are limited, so that one vote is allowed for every share up to ten, for every five shares between ten and one hundred, and for every ten shares beyond that.[1] But it is now held that a shareholder may distribute his stock in lots of ten among his friends, and thereby secure, in a clumsy and troublesome way, a vote for every share.[2]

The right to vote by proxy was not allowed at common law, in the absence of some special authorization.[3] This was often given the charter.[4] Contrary to what is now generally held,[5] it is very doubtful if the authority of a by-law would have been held in the last century sufficient to confer the right.[6]

That the directors of a corporation shall manage its affairs honestly and carefully is primarily a right of the corporation itself rather than of the individual stockholders. The question may, however, be considered in this connection.

The only authority before the present century is the case of The Charitable Corporation *v.* Sutton,[7] decided by Lord Hardwicke. But this case is the basis, mediate or immediate, of all subsequent decisions on the point, and it is still quoted as containing an accurate exposition of the law.[8] The cor-

[1] Buckley on the Companies Acts (4th ed.), 436.
[2] Moffat *v.* Farquhar, 7 Ch. D. 591, and cases therein cited.
[3] Phillips *v.* Wickham, 1 Paige Ch. 590; State *v.* Tudor, 5 Day 329; Taylor *v.* Griswold, 14 N. J. L. 222; People *v.* Twaddell, 18 Hun 427; Common. *v.* Bringhurst, 103 Pa. St. 134; Harben *v.* Phillips, 23 Ch. D. 14.
[4] *E. g.*, the charter of the Mine Adventurers, 9 Anne, c. 24, or of the Northumberland Fishery Soc., 29 Geo. III., c. 25.
[5] Common. *v.* Bringhurst, 103 Pa. St. 134, and cases therein cited.
[6] See the early case of Taylor *v.* Griswold, 14 N. J. L. 222 (1834).
[7] 2 Atk. 400.
[8] Taylor on Corp. § 619.

poration was charitable only in name, being a joint-stock corporation for lending money on pledges. By the fraud of some of the directors or "committee-men," and by the negligence of the rest, loans were made without proper security. The bill was against the directors and other officers, "to have a satisfaction for a breach of trust, fraud, and mismanagement." Lord Hardwicke granted the relief prayed, and a part of his decision is well worth quoting. He says, "Committee-men are most properly agents to those who employ them in this trust, and who empower them to direct and superintend the affairs of the corporation.

"In this respect they may be guilty of acts of commission or omission, of malfeasance or nonfeasance.[1]

"Now, where acts are executed within their authority, as repealing by-laws and making orders, in such cases, though attended with bad consequences, it will be very difficult to determine that these are breaches of trust. For it is by no means just in a judge, after bad consequences have arisen from such executions of their power, to say that they foresaw at the time what must necessarily happen, and therefore were guilty of a breach of trust.

"Next as to malfeasance and nonfeasance.

"To instance in non-attendance; if some persons are guilty of gross non-attendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others.

"By accepting of a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees.[2]

"Another objection has been made that the Court can make no decree upon these persons which will be just, for it is said that every man's non-attendance or omission of duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect which makes it a case out of the power

[1] Citing Domat's Civil Law, 2d B., tit. 3, secs. 1 and 2.
[2] Citing Coggs *v.* Bernard, 1 Salk. 26.

of this court. Now, if this doctrine should prevail, it is indeed laying the axe to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all liable.

"Nor will I ever determine that a Court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

The members of any corporation were entitled to inspect the books of the corporation. The only difference between business and other corporations as to the right of inspection was this: The books of municipal corporations and guilds might be inspected by non-members under certain circumstances, because the regulations of such bodies were not binding on members alone, and consequently outsiders might be vitally interested in the corporate proceedings.[1] Business corporations, on the other hand, were private, and the right of inspection belonged solely to members.[2]

The most important right of shareholders, the right to dividends, was of course always recognized. It is necessarily implied in the conception of a joint-stock company. No cases, however, seem to have been decided before the year 1800 which illustrate the nature of the right. The same remark applies to the right of a shareholder to share in the distribution of the capital stock if the affairs of the corporation are wound up.

The correlative duties imposed on a shareholder were fewer and simpler than his rights. In the first place, he was bound to pay to the corporation, when called upon, the amount of his share in the joint stock, or so much of it as had not been paid by prior holders. The practice of paying in instalments for stock subscribed seems to have arisen at an early date. It is referred to as common in 1723. Lord Macclesfield speaks of "the common by-laws of companies to deduct the calls out of the stocks of the members refusing to pay their calls."[3]

[1] See Grant on Corp. 311-313.
[2] Charitable Corp. *v.* Woodcraft, Cas. temp. Hard. 130.
[3] Child *v.* Hudson's Bay Co., 2 P. Wms. 207.

In 1796 the question arose whether an original subscriber could avoid liability for future calls by assigning his stock.[1] It was contended that the case was like the assignment of a lease, "in which, though the lessor consents to the lessee's assigning to a third person, he does not give up his remedy against the original lessee." The Court of King's Bench, however, decided that assignees held the shares on the same terms as the original subscribers, and were substituted in their places. The objection that an assignment might be made to insolvent persons was met by saying that it was presumed that the undertaking was a beneficial one, and therefore the right to forfeit shares for non-payment of calls furnished a sufficient check.

No doubt it has been settled for a long time that individual members are not liable for the debts of a corporation, and it has even been said that "the personal responsibility of the stockholders is inconsistent with the nature of a body corporate;"[2] yet in the Roman law it seems that if the corporation became insolvent the persons constituting it were obliged to contribute their private fortunes;[3] and though it may be hazardous to assert that at common law the rule was the same in England, it is certain that, so far as the evidence goes, it points to that conclusion. This was not on any theory that the debt of the corporation was directly the debt of its members, for the contrary seems to have been well understood. For instance, in Y. B. 19 Hy. VI. 80, it was held that an action of debt being brought against the Society of Lombards, and the sheriff having distrained two individual Lombards, trespass would lie against him. "For where a corporation is impleaded they ought not to distrain any private person." And in the case of Edmunds *v.* Brown[4] it was held that certain members of the Company of Woodmongers, who had signed a bond as its officers, were not personally liable when the company was dissolved.[5] If, however, there was an obli-

[1] Huddersfield Canal Co. *v.* Buckley, 7 T. R. 36.
[2] Myers *v.* Irwin, 2 S. & R. 371, *per* Tilghman, C. J.
[3] Ayliffe, 200, referring to code, Bk. i. tit. 3; Savigny Sys. § 92.
[4] 1 Lev. 237.
[5] See also Bishop of Rochester's Case, Owen 73; s. c. 2 And. 106; Case of the City of London, 1 Ventr. 351.

gation running to the corporation from its members, to be answerable to the corporation for the liability of the latter to the outside world,[1] this obligation would be part of its assets, which, though not available in a law court, could be reached in equity, and so indirectly the members could be forced to discharge the corporate debts. That such was the case was directly decided in the case of Dr. Salmon *v.* The Hamborough Company.[2] This was an appeal to the Lords from the dismissal of a bill in Chancery against the Hamborough Company and some of its individual members, setting forth that the company owed the plaintiff money, but had nothing to be distrained by, and could, therefore, not be made to appear.[3] The Lords ordered that the dismissal be reversed, and that if the company did not appear the bill should be taken *pro confesso*, and in that event, and also in case the company appeared and the plaintiff's claim was found just, a decree should be made that the company pay; and on failure to do so for ninety days, "that the governor or deputy governor and the twenty-four assistants of the said company, or so many of them as by the tenor of their charter do constitute a quorum for the making of leviations upon the trade or members of the said company, shall make such a leviation upon every member of the said company as is to be contributary to the public charge, as shall be sufficient to satisfy the sum decreed to the plaintiff;" and in case of failure to answer these "leviations," process of contempt should issue against them. By a note to Harvey *v.* East India Company,[4] it may be seen that the course thus outlined was actually carried out, and the individual members were charged in their private capacities. It is true that the Hamborough Company was a regulated, not a joint-stock, corporation; but there seems to be no reason why the question should not be the same for both kinds, or that, when the case was decided, there was supposed to be any distinction. In-

[1] That there was such an obligation in the Roman law see Savigny, § 92.

[2] Ch. Cas. 294; s. c. 6 Vin. Abr. 310.

[3] A *distringas* was the proper and only process against a corporation. Curson *v.* African Co., 1 Vern. 182; Harvey *v.* E. I. Co., 2 Vern. 395; 3 Keb. 230, pl. 8.

[4] 2 Vern. 396.

deed, there is no case decided before the present century which is inconsistent with the theory that members of a corporation are thus liable, though very possibly that idea became contrary to the general understanding.

In another early case[1] creditors who were members of the indebted company were postponed to the other creditors. Lord Nottingham says, "That if losses must fall upon the creditors, such losses should be borne by those who were members of the company, who best knew their estates and credit, and not by strangers who were drawn in to trust the company upon the credit and countenance it had from such particular members."

The case of Dr. Salmon *v.* The Hamborough Company was criticised by Fonblanque in 1793.[2] It was, however, followed to its fullest extent in South Carolina so late as 1826 in a very carefully considered case, and on appeal the decision was affirmed.[3] Even after 1840 the doctrine for which the case stands found support.[4]

The ways in which a corporation might be dissolved, and the consequences of dissolution, were fully considered by the older writers. It was laid down that a corporation might be dissolved, 1st, by act of Parliament; 2d, by the natural death of all its members; 3d, by surrender of its franchises; 4th, by forfeiture of its charter through negligence or abuse of its franchises.[5] The second of these methods is inapplicable to business corporations, for the shares of the members are property and would pass to their personal representatives.

[1] Naylor *v.* Brown, Finch, 83 (1673).

[2] 1 Fonblanque Eq. (1st ed.) 297, note. The learned author also suggests that the Hamborough Company was not incorporated, but in Viner's report of the case it is expressly called a corporation, and it appears that as a matter of fact it had been chartered. Ang. and Ames on Corp. (11th ed.) 42; 4 Am. Law Mag. 366, note.

[3] Hume *v.* Windyaw and Wando Canal Co., 1 Car. L. J. 217; s. c. 4 Am. L. Mag. 92.

[4] 1 Am. Law Mag. 96, answered in 4 Am. Law Mag. 363. See also a small pamphlet by A. L. Oliver, entitled "The Origin and Nature of Corporate Powers and Individual Responsibility of the Members of Trading Corporations at Common Law," in which the author favors the view here expressed, though on the broader, and it seems untenable, ground that a corporation is in its nature a partnership with a right to sue by one name.

[5] 1 Blackst. Com. 485, and to the same effect, 2 Kyd, 446.

Further, it should be added that a corporation may be dissolved by the expiration of the time limited in its charter.

Forfeiture of a charter was enforced by *scire facias* or an information in the nature of *quo warranto*. It is only in connection with the question of forfeiture that importance was attached to the fact that a corporation had acted in excess of the authority given by its charter. Not a trace of the modern doctrine of *ultra vires* is to be found before the present century.[1] The other ways in which a corporation could be dissolved need no elaboration.[2]

Kyd says,[3] "The effect of the dissolution of a corporation is, that all its lands revert to the donor, its privileges and franchises are extinguished, and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it in their natural capacities. What becomes of the personal estate is, perhaps, not decided, but probably it vests in the crown."

The accuracy of the statement that the lands of a dissolved corporation revert to the donor has been doubted in Gray on Perpetuities.[4] After a very careful examination of authorities the learned author arrives at the conclusion that the lands would escheat, and offers the following explanation to account for the prevalence of the theory which he controverts. Most early corporations held their lands in frankalmoign, a tenure in which the lord was always the donor. Hence, on the dissolution of a corporation, its lands, though they escheated, would generally go to the donor.

The explanation is ingenious, and very likely true. It may, however, be urged that Lord Coke, to whose statements [5] are to be attributed, in the main, the wide acceptance in later times of the doctrine under consideration, is not likely to have made such a palpable blunder in regard to a question of tenure. The suggestion is offered with diffidence, that a real or fancied analogy in the civil law may be the true founda-

[1] Brice, Ultra Vires (2d ed.), x.
[2] They are fully discussed in 2 Kyd, 446, Grant on Corp. 295, and elsewhere.
[3] Vol. ii. 516.
[4] §§ 46-51.
[5] Co. Lit., 13 b; Dean and Canons of Winsor *v.* Webb, Godb. 211.

tion on which the doctrine rests. The early English law of corporations is borrowed almost wholly from the Roman law.[1] This certainly creates an antecedent probability in favor of the suggestion offered. Domat says, "If a corporation were dissolved by order of the Prince, or otherwise, the members would take out what they had of their own in the corporation."[2] This confines the application of the rule to members; but it may have been regarded as applying to any donor of a corporation, or may, at least, have furnished an analogy.

The doctrine itself, whatever its basis may have been, was uniformly quoted by judges and text-writers as accurate,[3] excepting in one case.[4]

The disposition of the personalty of a corporation on its dissolution was not discussed by the early writers, undoubtedly because of the insignificance at that time of personal property. No expression of judicial opinion on the matter is to be found. Kyd's remark[5] probably represents the generally received opinion at the time he wrote.[6]

The statement was made by Blackstone[7] that "the debts of a corporation either to or from it are totally extinguished by its dissolution." This remark has been repeated by later authors, and has led to some confusion. It was, undoubtedly, an error. The only authority cited to support it is Edmunds *v.* Brown.[8] The Company of Woodmongers had been dissolved. It had given a bond to the plaintiff, which was signed by the defendants for the company. This action

[1] Mackenzie, Studies in Roman Law, 149; Grant on Corp. 2.

[2] Vol. ii. bk. i. tit. 15, § 2, Par. 8.

Mackenzie (Studies in Roman Law) says that no positive rule can be laid down as to what became of the property of a dissolved corporation; that it varied according to the nature of the corporation.

[3] 1 Roll. Abr. 816 a; Moore 282, 283, pl. 435; *per* Lord Hardwicke in Atty.-Gen. *v.* Gower, 9 Mod. 224, 226; *per* Lord Mansfield in Burgess *v.* Wheate, 1 W. Bl. 123, 165; Law of Corp. 300; Wood, Inst. bk. i. c. viii.; 1 Blackst. Com. 484; 2 Kyd, 516; Bell's Principles (Scotch), § 2190.

[4] Johnson *v.* Norway, Winch, 87, and Co. Lit. 13 b, Hargrave's note. In the case as reported no decision is given. The only authority is Hargrave's statement that in Lord Hale's MS. it is said that the court finally decided that the land should go to the lord, not to the donor.

[5] *Supra.*

[6] The same statement is made by counsel *arguendo* in Colchester *v.* Seaber, 3 Burr. 1868.

[7] 1 Com. 484.

[8] 1 Lev. 237.

was debt on the bond against the individuals who signed it. The plaintiff failed, and rightly, for the bond was not executed by the defendants as individuals but for the company. The difficulty, however, was simply in the remedy which the plaintiff chose. This is evident from the case of Naylor *v.* Brown,[1] — a suit in equity by the creditors of the Woodmongers' Company, begun immediately after the failure of the action at law just referred to. On the dissolution of the company, the members had divided up its property. It was decreed that the property should be returned, "it being in equity still a part of the estate of the late company," and that the debts due the plaintiffs should be discharged from the fund so formed. This important case, which seems to have been generally overlooked,[2] clearly shows that the property of a dissolved corporation was liable in equity for the corporate debts, although they were unenforceable at law.

Whether debts owing to a dissolved corporation could be enforced for the benefit of the creditors or members of the corporations, or for the benefit of the State as *bona vacantia*, was not decided before the year 1800.

The history of the law of business corporations has thus far been treated with reference only to English decisions. In this country questions pertaining to corporations were brought before the courts in very few cases until the nineteenth century.

Pennsylvania is entitled to the honor of having chartered the first business corporation in this country,[3] "The Philadelphia Contributionship for Insuring Houses from Loss by Fire." It was a mutual insurance company, first organized in 1752, but not chartered until 1768. It was the only business corporation whose charter antedated the Declaration of Independence. The next in order of time were: "The Bank of North America," chartered by Congress in 1781 and, the original charter having been repealed in 1785, by Pennsylvania in 1787; "The Massachusetts Bank," char-

[1] Finch, 83.

[2] It is not referred to by Blackstone, Kyd, Kent, Angell and Ames, Field, Taylor, Morawetz, or any other writer on the subject so far as observed.

[3] Laws of Pa. ch. dlxxvi.

tered in 1784; "The Proprietors of Charles River Bridge," in 1785; "The Mutual Assurance Co." (Philadelphia), in 1786; "The Associated Manufacturing Iron Co." (N. Y.), in 1786.

These were the only joint-stock business corporations chartered in America before 1787. After that time the number rapidly increased, especially in Massachusetts. Before the close of the century there were created in that State about fifty such bodies, at least half of them turnpike and bridge companies. In the remaining States combined, there were perhaps as many more. There was no great variety in the purposes for which these early companies were formed. Insurance, banking, turnpike roads, toll-bridges, canals, and, to a limited extent, manufacturing[1] were the enterprises which they carried on.

The rapid growth of corporations was followed in the early decades of the nineteenth century by the judicial decision of the questions which naturally arose as to the nature of the bodies which had been created by the Legislature, their rights and duties, and the rights and duties of their stockholders. But not even a beginning of this development was made prior to the year 1800. Before that time, whatever knowledge of these matters American lawyers possessed must have been derived from the English cases and English textbooks previously considered.

[1] There were several manufacturing companies in Massachusetts, but very few in other States.

58. HISTORY OF THE LAW OF PRIVATE CORPORATIONS IN THE COLONIES AND STATES[1]

By Simeon Eben Baldwin[2]

THE law of corporations was the law of their being for the four original New England colonies. Of whatever else they might be ignorant, every man, woman, and child must know something of that. It governed all the relations of life. This was true, whether the government to which they were subject was set up under a charter from the crown or those who held a royal patent,[3] or — as in New Haven — was a theocratic republic, owing its authority to the consent of the inhabitants. The one rested on the law of private corporations *de jure:* the other on that of public corporations *de facto.*

On October 25, 1639, the first General Court of the plantation of New Haven was organized, and on October 26, an Indian was arrested under its authority on a charge of murder. Three days later he was tried and sentenced, and the day following his head was cut off "and pittched upon a pole in the markett-place."[4] We may be sure that this was not done by such men as Eaton and Davenport, nor the steps

[1] This Essay was first published in "Two Centuries' Growth of American Law," Yale University Bicentennial Publications, on the occasion of its Bicentennial, 1901, (New York: Scribner's Sons), pp. 261-281, being part of c. X.

[2] Chief Justice of the Supreme Court of Errors of Connecticut, and Professor of Constitutional and Private International Law in Yale University. A. B. 1861, A. M. 1864, Yale University, LL. D. 1891, Harvard University.

Other Publications: Modern Political Institutions, 1898; American Railroad Law, 1904; The American Judiciary, 1905; and numerous articles in legal journals and transactions of societies.

[3] See Chapter II., pp. 11, 17-19, 21, 24.

[4] *New Haven Col. Rec.*, I. 24.

taken that put them in a position in which they might be called upon to take such action, without careful study, first, of the powers rightfully belonging to *de facto* public corporations.

For all the charter governments, the seventeenth century, as has been suggested in Chapter II., was one long school of study for their leaders into the rights of private corporations as founders of colonies, and then into those of the colonies as they grew into public corporations — or provinces hardly distinguishable from public corporations [1] — and received, as such, new authority from the Crown. Occasions arose upon which they sought counsel as to points of this kind from the leaders of the English bar, and the opinions thus obtained were eagerly read and everywhere discussed, not only by those in authority, but by their constituents in every local community.[2]

That the colonists thought and studied on these problems for themselves is evidenced by a letter from the General Court of Massachusetts to the counsel whom they had retained to defend against *quo warranto* proceedings brought for a forfeiture of the colony charter in 1683. He had been authorized to engage professional assistance, and "we question not," they wrote, "but the counsel which you retain will consult my Lord Coke his Fourth Part, about the Isle of Man, and of Guernsey, Jersey, and Gascoigne, while in the possession of the Kings of England: where it is concluded by the Judges, that these, being *extra regnum*, cannot be adjudged at the King's Bench, nor can appeal lie from them, &c." [3]

The question met and decided for itself by the Colony of New Haven at its outset was answered in the same way by the charter governments with which she soon became con-

[1] See *Report of the American Historical Association* for 1895, 619, 626, and *Pennsylvania Statutes at Large*, V. 645, 735.

[2] Such was the opinion of Ward, Somers, and Treby, given at the request of Connecticut in 1690, as to the effect of her involuntary submission to Sir Edmund Andros, upon her charter rights. Trumbull's *Hist. of Conn.*, I. 407. See also that from Sir John Holt (afterwards Chief Justice) and seven others in *New Jersey Archives*, 1st series, I. 272.

[3] Palfrey, *Hist. of New England*, III. 389.

federated, and into one of which she was finally absorbed. They claimed and exercised from the first the power of life and death as respects all crimes committed within their territorial limits; but to do so, it was necessary to found it on the general grant to them of legislative authority. The view repeatedly urged upon the home government in opposition to this contention, that the charters contemplated only the making of such by-laws as a trading corporation might need for its better regulation,[1] was certainly plausible, and their use as the foundation of capital sentences was disputed before the Queen in Council in an attack upon the Connecticut charter as late as 1705.[2]

The Englishman's right to local self-government, wherever he was, was the question fundamentally at issue, and as to that, the general sentiment was the same throughout all the colonies. Ultimately it led to a gradual undermining of the authority of the provincial Governors and their Councils, which prepared the way for American independence.

Even after that event, however, and when the political sovereignty of the United States and of each of them had been fully acknowledged by Great Britain, the English courts continued to insist that the colonies had never occupied the position of public governments. Maryland, in the first half of the eighteenth century, had put out circulating bills, as currency, on the security of shipments of tobacco, the proceeds of which were invested in stock of the Bank of England held by trustees appointed for the purpose. The title of the State of Maryland to this stock came in question before the English Court of Chancery some years after the Treaty of Peace. If the doctrine of public law that a change in the political government of a people does not affect its proprietary rights or obligations was to apply, the equitable interest in the shares belonged to the State. It was held by Lord Loughborough that it did not apply. "The old government of Maryland," he said, "a government of a singular species, existing by Letters Patent, in some degree similar to a corporation, possessing rights in England, must sue in

[1] See Palfrey's *Hist. of New England*, I. 307.
[2] Hinman, *Letters from the English Kings*, etc., 325, 328.

England, and ought to be regulated by the law of England, under which it has its existence." [1] Under that law, in his opinion, the new State could not be regarded as its lawful successor in title.

Lord Eldon, in referring to this case some years later, summarized it as deciding "that the property in question, which was stock in a London corporation held by English trustees, as it belonged originally to a corporation existing by the King's charter, was not to be transferred to the State of Maryland after the Treaty of Peace of 1783, as that State did not exist by the King's authority; but constituted *bona vacantia*, and fell to the Crown." [2]

In this known attitude of the English courts, early taken and always maintained, reflecting, as it did, the attitude of the English Crown, we find one of the divisive forces leading to the Revolution. Opposed to it from the first was an American doctrine of colonial and corporate rights, rooted in Massachusetts Bay, and emphasizing the political and public character of our local governments. The better to repress its growth, the mother country, about the year 1680,[3] determined to make applicable here the system of appeals to the King in Council, which she had devised for the better regulation of what remained of her French possessions, — the Channel Islands. That, under their charters, their proceedings were thus subject to review, some of the American colonies at first denied, and it took nearly half a century for the Crown to establish it as unquestionable.[4]

This contest against a royal prerogative, the maintenance of which all now must admit to have been then indispensable to the preservation of proper relations between England and her colonies, was one of the chief causes of a bill brought into the House of Lords by the ministry in 1701, to bring back under the direct control of the throne, by means of royal

[1] Barclay *v.* Russell, 5 Vesey's Reports, 424, 434.
[2] Dolder *v.* Bank of England, 10 Vesey's Reports, 352, 354.
[3] Pitkin, *Hist. of the United States*, I. 23.
[4] See the memorial to the Lords Commissioners of Trade and Plantations, drawn for Connecticut in 1700, and other documents of following years, in Hinman's *Letters*, 286, 292, 296, 316, 328; *Report of the American Historical Association* for 1894, 314; *Pennsylvania Statutes at Large* (ed. 1899), III. 32. *Cf.* Chapter II. p. 18.

Governors, all those of the American colonies not already subject to those so appointed.[1]

By this time it was becoming the custom for each colony to keep in commission an agent at London to watch proceedings at court or in Parliament, and represent its interests wherever they might be concerned. One of them, Sir Henry Ashurst, procured leave for Connecticut to be heard by counsel at the bar of the House against this bill, and it was defeated, largely by raising the cry that its enactment would afford a precedent alarming to all the chartered corporations in England.[2]

A few years later, in 1714, a similar measure was again introduced and again defeated. The main object of that was to get rid of the proprietary government in Carolina; but the Northern colonies, in carefully prepared "cases," copies of which have recently been found among the MSS. in the Bodleian library, successfully opposed it, insisting, among other grounds, upon this: that while it was true that if a charter held as private property were revoked for reasons of State policy, due compensation could be made to those divested of their franchises; yet, as those of the New England Colonies were vested in the body of the people, no equivalent for their loss could be provided.[3]

Questions like these were too large for the American lawyers of those days to handle. They belonged rather to statesmen. Franklin was perhaps the first of our countrymen to deserve that name, and he discussed them with more force than could any of the bar. There were indeed few in America during the first half of the eighteenth century who could be called lawyers.[4] Those who had come over in the original companies of planters had passed away. There were no facilities for legal education in this country, and no inducement to incur the expense of seeking one in the Inns of Court at London, for our colonial courts were held by men little versed in law, and often, like the Roman prætors, holding judicial office as an incident of civil office.

[1] Pitkin's *Hist. of the United States*, I. 125.
[2] Trumbull, *Hist. of Connecticut*, I. 431.
[3] *Report of the American Historical Association* for 1892, 25, 27.
[4] See Chapter II. pp. 13-17.

The few controversies that might still arise before our domestic tribunals upon the construction and effect of colonial charters or grants belonged rather to the domain of public law. There was slight occasion, except as a mere matter of speculative inquiry, to study the principles governing private corporations, until such bodies were constituted by our own legislatures. The law of municipal corporations, however, became somewhat earlier a subject of investigation.[1] The practice of the proprietaries, Governors, or legislatures in every colony, almost from the beginning of the eighteenth century had established it as one of their prerogatives to confer upon the owners or inhabitants of any political division of territory within their jurisdiction the attribute of legal personality.[2] This is the essence of every corporation and, to understand all that it implies, some knowledge of the scientific conceptions of jurisprudence is quite necessary.

A franchise of this kind must come from the sovereign power of the State, either directly or by delegation. Such a delegation was fairly implied in favor of the creation of political agencies for local government like towns and cities. But if for these purposes, why not for any which were political and governmental?

This line of reasoning early led to the incorporation of religious societies for the support of churches in most of the colonies, and was followed by Massachusetts, in 1639, so far as to induce the incorporation of a military company, and then of Harvard College, in 1650.

But by this last step a new field was clearly invaded. A college had always been considered by English law as something belonging to the field of ecclesiastical order and superintendence, and to be set up only by special permission from the highest authority. To found such institutions had been claimed as a papal prerogative. After the Reformation certainly, it belonged solely to the Crown. A college could only be founded by license from the King.[3] His title, in the

[1] See Chapter IX. p. 259.

[2] Baldwin, *Modern Political Institutions*, 184; *Report of the American Historical Association* for 1895, 304.

[3] Jacobs' *Law Dictionary, in verbo;* Adams & Lambert's Case, 4 Reports, 107.

form adopted by Henry VIII., was, *inter alia*, "*Fidei Defensor, in terra Ecclesiæ Anglicanæ & Hiberniæ supremum caput;*"[1] and in an ecclesiastical commission issued as late as 1728 we find George II. styling himself, yet more offensively, "*supremum ecclesiæ in terris caput.*"[2] It is probable that Massachusetts only ventured on the incorporation of Harvard because the execution of Charles I. had extinguished for the time, and, she hoped, for all time, the royal prerogative, and replaced it by the form of a free commonwealth. She paid dearly for this. In the next reign she was called to account for it and certain other excesses of authority, before the Lord Chancellor, on a writ of *scire facias*, and in 1684 a judgment was entered against her for the cancellation of her colonial charter.[3]

In 1701, when the plan for establishing a college in Connecticut was taking shape, this ill consequence of the foundation of Harvard was in all men's minds, and explains the care to avoid giving any definite form of incorporation to the ten Trustees or "Undertakers," in the Act of the Assembly which is commonly called the first charter of Yale.[4]

Similar caution dictated the general policy of all the colonial legislatures in matters of this description. Down to 1741, when Parliament intervened and absolutely forbade for the future any American grants of corporate privileges for business purposes,[5] there had been but three such, and during the whole of the eighteenth century, including the period subsequent to the Declaration of Independence, the number granted probably did not exceed two hundred and fifty.

A list of these charters, from the first settlements down to 1799, inclusive, which is believed to be approximately correct, follows this chapter and may serve to show how slowly the American business corporation became a factor in our economic life. I am aware of no published record of an

[1] Cowel's *Interpreter* (ed. 1727), Chronological Table.
[2] *Documents relating to Col. Hist. of New York*, V. 849.
[3] Palfrey, *Hist. of New England*, III. 390, 394; *New Haven Colony Hist. Soc. Papers*, III. 413.
[4] *New Haven Colony Hist. Soc. Papers*, III. 406, 410.
[5] By the extension to the colonies of the "Bubble Act" of 1720. Hildreth, *Hist. of the United States*, II. 380; *Transactions of the Colonial Society of Massachusetts*, III. 27.

a company name. One of the earliest of those of the latter description was the Undertakers of the Iron Works, who were given special privileges by the General Court of Massachusetts soon after the establishment of the Colony. The first grant was in 1643, and a later one, which has sometimes, though I think erroneously, been termed a charter of incorporation, was obtained in 1645. They soon found it necessary to call their managing agent to account in a suit demanding a balance of £13,000 from him, and their affairs occupied much of the time of the General Court for ten or twelve years. They sued in the names of certain persons as their deputies and attorneys, and it was apparently conceded that those who were full partners in the enterprise were personally liable to the creditors of the concern.[3]

Similar privileges were afterwards given to other undertakers, engaged in the same kind of mining.[4]

In 1670 a committee of the General Court was authorized to treat with certain "adventurers" who had asked for special privileges as manufacturers of salt, as to granting them a charter, but nothing further was done in regard to it.[5]

One of these partnership companies was formed for bank-

[1] Bank of North America *v.* Vardon, 2 Dallas' Reports, 78.
[2] 3 Day.
[3] *Mass. Col. Records,* 1642-9, 61, 81, 103, 125, 185; III. 56, 351, 370; IV. 188. Bolles, *American Industrial History,* 190.
[4] *Mass. Col. Records,* IV. 311.
[5] *Mass. Col. Records,* 1661-1674, IV. pt. ii. 505.

ing purposes in Massachusetts, under the license or sanction of Governor Dudley in 1686.[1]

In the same year we find in the early records of Pennsylvania one instance of an attempt of a number of landholders to combine without any public license or authority for the joint management and disposition of their interests, under a common seal. The agreement for this purpose was executed at Frankfort-on-the-Main in 1686; probably in ignorance of the English law of incorporation. The name assumed was "The Frankfort Company," and it appeared under this designation in a suit in the colonial courts in 1708,[2] but never, I believe, received a charter.

In 1688, Wait Winthrop and other inhabitants of Massachusetts united with Sir Matthew Dudley and others in England, in a petition to the Crown for a charter of incorporation for a trading company with authority to open mines in New England. The colony instructed its agent at court to object to the grant, urging that any such charter tended to create a monopoly and enhance prices, and trenched upon the field of government. The Attorney-General was consulted by the Lords of Trade and Plantations in regard to the matter, and gave an opinion that there was no legal objection, but the petition was finally rejected in 1703.[3]

The Ohio Company was incorporated in England in 1749, by a royal charter, for the purpose of dealing in American lands and effecting settlements beyond the Alleghanies, its capital stock being divided into twenty shares.[4] The other land companies whose names often appear in our colonial history were, it is believed, with one exception,[5] all voluntary associations. Of these, perhaps the best known was the Indiana Company, but it consisted simply of a number of sufferers from Indian depredations, who accepted a grant of three million acres in what is now Indiana from the Six

[1] It has been stated that this was actually incorporated, but I find no evidence of that: *Proceedings of the American Antiquarian Society* for 1884, 266; Trumbull, *First Essays in Banking*, 12.

[2] Heather *v.* The Frankfort Company, Pa. Colonial Cases, 147.

[3] Palfrey, *Hist. of New England*, IV. 395, n.

[4] *Life of George Mason*, I. 58.

[5] The Society of Free Traders of Pennsylvania.

Nations in satisfaction of their claims. The conveyance was made to the King in trust for them according to their respective interests, and the suit brought in the Supreme Court of the United States in 1793 against the State of Virginia to enforce their title was instituted in the names of the equitable owners as individuals.[1]

Among the moneyed companies with a considerable capital, but unincorporated, which were engaged in active business during the colonial period, several of the most prominent were in Maryland. The Patapsco Iron Works Company, sometimes called the Baltimore Company, was an important concern there as early as 1731.[2] Another was the Potomac Company, or Potomac Canal Company, formed for improving the navigation of the Potomac River in 1762,[3] and finally incorporated in 1784;[4] and a third also deserves mention, the partnership known in 1781 as the Principio Company.

Some of these associations received from the colonial authorities almost all the attributes of corporations, except what it was thought impossible to confer, that of artificial personality. Similar privileges were also bestowed on tenants in common of landed property. Thus in 1709, the General Assembly of Connecticut gave the major part of the proprietors of the Simsbury copper mines power to appoint annually a committee with the powers for their management now usual for a board of directors, and even erected a special court to determine any differences that might arise between the owners or those with whom they dealt.[6]

Adjoining proprietors of low lands or on a water-course were not infrequently given power to associate for improving their property in such manner as a majority might determine. Some of these drain companies were made quasi-

[1] *Life of George Mason*, I. 284, II. 341; *Calendar of Virginia State Papers*, Vol. VI.
[2] *Life of Charles Carroll of Carrollton*, I. 23, 60; Bishop, *Hist. of American Manufactures*, I. 586.
[3] *Life of Carroll*, 94.
[4] Pickell's *Hist. of the Potomac Company*, 44, 64.
[5] See *Laws of Maryland* (ed. 1811), I. 419.
[6] *Colonial Records of Connecticut*, 1706-1716, 105. *Cf. Ibid.* 315; *Col. Rec.*, I. 222.

corporations, and could sue in the name of the treasurer. They were really public agencies, created on account of the interest of the State in regulating a use of land or water shared in by many under separate titles, and it was no part of their purpose to make money for their members. Indeed, their powers extended over those who might not desire to come into them, precisely as is the case with municipal corporations.[1]

It was one of the greatest of the voluntary joint-stock companies, the "Manufacturing Company" or Land-bank of Massachusetts, whose issue of circulating bills in 1740, against the protest of the royal Governor, to the amount of nearly £50,000, led to the Act of 1741, which has been already mentioned.[2] This made unlawful the establishment of or transaction of business by any unincorporated joint-stock company, having transferable shares, and consisting of over six persons. Any one violating the statute was subject to the penalties of *præmunire*, that is, of confiscation and imprisonment, and to payment of treble damages to any merchant suffering by his acts.[3] This continued to be the law of the land for every American Colony until the Revolution.

The earliest moneyed corporation, formed for the profit of its members to come into existence on this continent, under a legislative charter, was the "New London Society United for Trade and Commerce in Connecticut," incorporated perpetually in 1732. It was a rash act. The society was formed for trading with any of "his Majesties Dominions, and for encouraging the Fishery, &c., as well for the common good as their own private interest."[4] It proceeded to

[1] Of this kind were the following in Pennsylvania, which are sometimes referred to as incorporated:—

1760.	The Richmond Company *Pa. Stat. at Large* (ed. 1899), VI.	24
	The Greenwich Island Company	34, 408
1761.	The Ridley Company	77
1762.	The Wicaco Company	135
	The Tinicum Company	147
	The Kingsessing Company	147
	The Company of the Southern District of Darby Meadow	170
1765.	The Company of the Eastern Division of Boon's Island	420

[2] *Transactions of the Col. Soc. of Massachusetts*, III. 2, 22, 34.

[3] *Ibid.*, 26.

[4] *Colonial Records of Connecticut*, VII. 390.

set up a land-bank and issue circulating notes, and with consequences so disastrous to the currency of the colony that after a single year the charter was declared forfeited and repealed, a special court of chancery being organized *ad litem* to wind up its affairs and do what justice it could to the unfortunate billholders.[1] The General Assembly also resolved that "although a corporation may make a fraternity for the management of trades, arts, mysteries, endowed with authority to regulate themselves in the management thereof: yet (inasmuch as all companies of merchants are made at home by letters patent from the King, and we know not of one single instance of any government in the plantations doing such a thing), that it is, at least, very doubtful whether we have authority to make such a society; and hazardous, therefore, for this government to presume upon it."[2]

This reference to fraternities was probably made in view of certain action taken by the General Court of Massachusetts in the previous century. That was a grant of license to the shoemakers of Boston to form a guild for the better regulation of their trade, and investing them with a monopoly of the market. It was made in 1648 and was to endure for three years only. There was no capital stock, no provision for a common seal, no specification of the name to be assumed, nor were any words used that were indicative of an intention to constitute a legal corporation. Similar privileges were granted at the same session to the coopers of Boston and Charlestown.[3]

Pennsylvania, in 1768, ventured to incorporate a fire insurance company;[4] but not till the Continental Congress led the way was there to be found, after 1741, a commercial corporation of any magnitude under an American charter. In 1781 came the Bank of North America, with an author-

[1] *Colonial Records of Connecticut*, VII. 421, 450.
[2] *Colonial Records of Connecticut*, VII. 421.
[3] *Massachusetts Colonial Records*, 1644-1657, 132, 133.
[4] This was probably not in existence in 1776. See statement of Mr. Ingersoll of Philadelphia, *arguendo*, in Bank of Augusta *v.* Earle, 13 Peters' Reports, 575.

ized capital of $10,000,000, incorporated by the United States, and soon reincorporated by Pennsylvania.

Up to this time, the only branch of corporation law which had been of real importance in the United States, except that concerning public (including municipal) corporations, was the law of religious societies. These had been freely incorporated both by the royal Governors and the colonial Assemblies, and soon acquired considerable possessions, some of them receiving public grants.[1] In the Colonies where there was an established church, charters for any of a different character were obtained with difficulty. The Earl of Bellomont, when Governor of New York, wrote in 1698 to the Lords Commissioners of Trade and Plantations, of one procured by a Dutch Reformed Church from one of his predecessors (and as it was hinted by means of a present of plate) that such a grant was a very extraordinary proceeding "for it is setting up a petty jurisdiction to fly into the face of the government."[2]

There were also two missionary societies chartered in England for operations in America, which were much before the public eye. One was "the President and Society for Propagating the Gospel in New England and Parts adjacent" incorporated in 1659 under the Commonwealth, and rechartered soon after the Restoration. This was in the hands of the dissenters.[3] The other, the "Society for the Propagation of the Gospel in Foreign Parts," was chartered in 1701, in the interest of the Church of England, by the procurement of an American clergyman, the Rev. Dr. Thomas Bray, Commissary of the Bishop of London for Maryland.[4] This soon sent its missionaries over all the colonies. Grants of land were occasionally made to it, and it not infrequently stood behind the parish clergy, when they were setting up the claims of the church to property which had been devoted to pious uses.[5]

[1] See *Documents relating to Colonial History of New York*, IV. 271.
[2] *Documents relating to Colonial History of New York*, IV. 427, 463.
[3] Douglass' *Summary*, II. 121; *Documents relating to the Colonial History of New York*, IV. 455.
[4] Perry, *History of the American Episcopal Church*, I. 142.
[5] See Douglass' *Summary*, II. 106, 124, 127.

It has been already said that the large business enterprises of the earlier colonists had been managed through the form of voluntary association in a joint-stock company. Such organizations were good at common law, and when the Act of Parliament by which they were prohibited in the colonies after 1741 fell with the Revolution, the old practice was naturally resumed.

Alexander Hamilton organized in this manner the Bank of New York,[1] which did a large business without a charter until 1791.

Land companies were formed in the same way. The Connecticut Gore Land Company, which bought in 1795 the Connecticut title to a long gore of territory west of the Delaware River, was one of this kind, and the conveyance was taken to five of the members, in behalf of all the shareholders.[2]

The table appended to this chapter shows that no considerable impulse towards the granting of business charters was felt in any of the United States until after the adoption of the national Constitution. This first put our foreign commerce and that between the States upon a solid footing. It first also gave to capital a sense of security, for the government which it replaced had been found from the first too weak even to protect itself.

The States, however, for many years after 1789 dealt such charters out with a sparing hand, and most of the large business enterprises were still carried on by voluntary associations. The cumbersome methods of combining capital which were endured originally from the cost of getting a royal charter were followed after the Revolution, largely by the force of tradition. At the opening of the two centuries of which this volume particularly treats, there had been but three joint-stock commercial companies under full charters existing in England,[3] and the monopolies enjoyed by the "regulated" companies had fallen under the ban of the Parliament which came in with William and Mary. So

[1] Hamilton's *Works*, I. 414 *et seq.*
[2] *Report of the American Historical Association for* 1898, 148.
[3] They were the East India Co., the Royal African Co., and the Hudson's Bay Co. Anderson, *History of Commerce*, II. 598.

late as 1717 the Attorney-General and Solicitor-General had advised the rejection of an application for the incorporation of a London marine insurance company, as being a dangerous experiment.[1] It took the descendants of the English colonists in America a long time to emancipate themselves from their inherited prejudices against private corporations. It was the same sentiment that put so many restrictions against voting in proportion to stock interests into our earlier charters, and which looks to-day with disfavor and suspicion upon the modern "trust," whether its business be fairly or unfairly conducted.

Of the charters granted prior to 1800 for moneyed corporations, two-thirds were of a quasi-public character, and such as carried or might properly have carried the right of eminent domain. Most of these were for the improvement of transportation facilities by roads, bridges, and canals, or by deepening rivers or harbors. Of the corporations whose business would bring them into daily contact with the people at large, irrespective of locality, there were less than eighty, the most considerable of which were twenty-eight banks and twenty-five insurance companies.

By this time, however, the number of public and municipal corporations, religious societies, academies, library companies, and public quasi-corporations, such as drain companies, had become very large, and probably approached two thousand. The principle of freedom of incorporation or organization under general laws had been applied to them in several of the States, although only extended thus far to a single class of private corporations, and by a single State.[2]

What now had been accomplished towards the formation of an American law of corporations by the close of the eighteenth century?

Law is the philosophy of society. It must reflect the political and economic views of the State for which it speaks, or it speaks in vain. It must answer the needs of the people

[1] Chalmers' *Opinions of Lawyers*, 599, 608.
[2] North Carolina, in the case of canal companies.

who are subject to it, or they will throw it aside. Under the English and American system of government to keep Law and Society in adjustment to each other is mainly the office of the Judges. The people believe that their will is, on the whole, more faithfully interpreted and fulfilled by courts than by legislatures. The legislature hears the loudest talkers, and hurries to the relief of the last sufferer, without always stopping to consider how helping him will affect the rest of the community. The courts act more slowly. They do not act at all unless parties in interest have had a fair opportunity to be heard. They take that judicial notice of the lessons of history and the nature of things, which stands for the common knowledge and common sense of the people at large. They administer a science which rests on reason, and proclaims as one of its fundamental principles: *Cessante ratione, cessat et ipsa lex.*[1]

It was with these powers that the American judiciary first took up the work of bringing the English law of corporations into harmony with the social conditions of the colonies.

Our political conditions differed widely from those of the mother country: our social conditions more widely still.

There one class of corporations — the corporation sole — had been created for the benefit of an hereditary crown and an established church. We had got rid of one, and were, wherever the other still existed, steadily advancing towards its destruction.

The English corporation held its franchise as a special favor. It was of the nature of a monopoly; perhaps a reward for party service; perhaps gained by a purchase for which some minister or court favorite received the price.

The American corporation could only come into existence legitimately for the public good. Such franchises, under the principles of our government, could only be dealt out with an equal hand.

These considerations early led our courts to certain defi-

[1] I venture to think that Sir H. S. Maine has laid too much stress on Legal Fiction as the instrument by which this judicial power is applied. See his *Ancient Law*, chapter ii.

nite conclusions as to the nature of corporate rights, which differed essentially from those of English law.

Before the Revolution the people had accustomed themselves to the assertion that their charters had made them certain irrevocable grants, one of which was that they were to possess all the rights and privileges of Englishmen. From this standpoint, it was a logical conclusion that they could not be taxed without their own consent. To do so was to alter the colonial charters, and in the language of Franklin, they could not be altered, "but by consent of both parties, the King and the colonies."[1] An executed grant is inviolable because it is a contract. The party who made it has lost certain rights; the party who received and accepted it has acquired them; and each must stand by his bargain.

The same effect was attributed under the proprietary charters, both to them and to such charters as the proprietaries might themselves grant by their delegated authority.[2] President Clap in 1763 had set up, and successfully, a similar claim as to the charter of Yale College, when the General Assembly were threatening to amend it without the consent of the corporation.[3]

Here then was one *fait accompli*. It became such by the Revolution, if not before it. The Declaration of Independence proclaimed this doctrine of the inviolability of grants of franchises, when it gave as a reason for renouncing all allegiance to George III. that he had assented to Acts of Parliament "for taking away our charters . . . and altering fundamentally the powers of our governments."

A different theory was asserted and acted upon by Pennsylvania in 1785, when she repealed the charter which she had granted to the Bank of North America, notwithstanding the masterly argument of James Wilson in support of its vested rights.[4] Two years later, however, the injustice was

[1] These words were used by him in 1769. Franklin's *Works* (ed. of 1834), I. 220. He had asserted the same doctrine at the bar of the House of Commons in 1766. *Ibid.*, 214.

[2] *Ibid.*, I. v. *Report of the Committee of Grievances of the Assembly of Pennsylvania*, in 1757.

[3] Trumbull, *History of Connecticut*, II. 331.

[4] Wilson's *Works* (ed. of 1896), I. 549.

redressed by a new charter, and as soon as the question whether a charter was a contract came before a judicial body it was unhesitatingly (in the *Dartmouth College Case*) decided to be such, and therefore to be inviolable.[1]

Another doctrine may be said to have become established by popular acquiescence before the opening of the nineteenth century. It is that a corporation can acquire a legal existence under the laws of several States, by accepting a charter from each; and so in each be a corporation, although holding its meetings in but one of them.

The first of these organizations was the Bank of North America, chartered first by the Congress of the United States in 1781, and then in 1782 by Pennsylvania [2] and New York, and in 1786 by Delaware. This is still in existence under the form of a national banking association. Another was "The Corporation for the Relief of the Widows and Children of Clergymen in the Communion of the Church of England in America," which received charters from New York, New Jersey, and Pennsylvania (1785). Each authorized the annual meetings to be held in any of these States, according to such rotation as it might appoint.[3] This organization was found to be unwieldy, and in 1797, by concurrent legislation on the part of these three States, provision was made for dividing it into three new corporations. The method devised, as set forth in the new Pennsylvania charter,[4] was a grant from each State to its citizens, who were members of the "aggregate" or in modern parlance "consolidated" corporation, to draw off and form a separate one, on such terms as they might agree on with their fellow-members from New York and New Jersey for the division of the corporate funds. When such a division should be agreed on, the seal of the old corporation was to be broken, and the Pennsylvania citizens were to become "The Corporation for the Relief of the Widows and Children in the Communion of the Protestant Episcopal Church in the Commonwealth of Pennsylvania," with a new seal of their own.

[1] Dartmouth College *v.* Woodward, 4 Wheaton's Reports, 518.
[2] This Pennsylvania charter, repealed in 1785, was restored in 1787.
[3] Dallas, *Laws of Pennsylvania*, II. 135, 240.
[4] Dallas, *Laws of Pennsylvania*, IV. 136.

The courts of the nineteenth century have often had occasion to define the nature and incidents of such consolidated corporations; but they were an inheritance from the century before, and in that the legal conception of a dual personality in bodies of this nature had become familiar.

In respect to the powers of legislation granted by the colonial charters, the popular construction, as has been seen, had always favored extreme liberality. This was in accordance with the general English doctrine that as a corporation was a person, it had all the rights of a person, in the absence of a particular exception or prohibition. This lay at the root of much of the opposition to the ratification of the Constitution of the United States. As Patrick Henry put it, in addressing the Virginia Convention, the Congress which it created could do everything that it was not forbidden to do.[1] But as soon as the courts set themselves to constructing an American theory of corporate personality, the judicial position became antagonistic to what had been the common opinion before the Revolution. All our circumstances were changed. It had been our interest to make the most and claim the most of whatever franchises we had obtained from the Crown or the agents of the Crown. Americans had been only recipients of corporate privileges. Now they began to be givers, also. They had been but too glad to repeat the doctrine of the English Judges that corporations possessed power to do anything which they had not been expressly or by fair implication forbidden to do.[2] Their own Judges now began to assert that corporations could do nothing which they were not expressly or by fair implication authorized to do.[3]

Starting with this assumption there was less to fear from free grants of corporate franchises. They could be used for the proper purposes of the corporation, but for those only. Hence the principle of free incorporation under general laws early found its way into American legislation, while

[1] Elliot's *Debates*, III. 461.
[2] Pollock on *Contracts*, Appendix D.
[3] Head *v.* Providence Insurance Co., 2 Cranch's Reports, 127; Baldwin, *Modern Political Institutions*, 206.

even now it is in England subject to great restrictions. Hence also special charters have been far more freely granted with us, and corporation law has become a much more important and extensive branch of jurisprudence.[1] Hence also the corporations of one State were for a long time encouraged to engage freely in business in any of the others, and are still admitted for this purpose on easy terms.[2] Up to 1839, on the other hand, no case was to be found in the English reports of a suit brought by a foreign corporation on an English contract.[3]

The first general incorporation law, since the days of Queen Elizabeth, was enacted by New York in 1784. Delaware followed in the same line in 1787,[4] and Pennsylvania in 1791.[5] The system thus early inaugurated and since so extensively pursued, of free incorporation, offered to all on equal terms, removed the foundations of the common-law doctrine that to charter a corporation indicated special confidence in those named as corporators, and so implied a trust in the artificial person thus created which justified a liberal construction of its rights and powers. In its application to municipal corporations not only was this view early abandoned by our courts, but they have gone to what might be regarded as the other extreme and hold that no powers are implied in their favor which are not either such that their possession is necessary for the proper exercise of those expressly granted, or indispensable to the fulfilment of the public purposes to be attained.[6]

[1] Commonwealth *v.* Arrison, 15 Sergeant & Rawle's Reports, 131.
[2] Bushel *v.* Commonwealth Ins. Co., 15 Sergeant & Rawle's Reports, 176.
[3] Ingersoll, *arguendo,* in Bank of Augusta *v.* Earle, 13 Peters' Reports, 573.
[4] *Laws of Delaware* (ed. of 1797), II. 879.
[5] Baldwin, *Modern Political Institutions,* 174, 194.
[6] Merrill *v.* Monticello, 138 United States Reports, 673, 681; Crofut *v.* Danbury, 65 Connecticut Reports, 294, 300.

PART VI.

CONTRACTS

59. The History of Assumpsit.

JAMES BARR AMES.

60. The History of Parol Contracts prior to Assumpsit.

JAMES BARR AMES.

61. The History of Contract.

JOHN WILLIAM SALMOND.

62. The History of the Beneficiary Third Person's Action in Assumpsit.

CRAWFORD DAWES HENING.

63. The History of Agency.

OLIVER WENDELL HOLMES, JR.

OTHER REFERENCES ON THE SUBJECT OF THIS PART ARE AS FOLLOWS:

History of the Common Law Theory of Contract, by C. Morse (Canada Law Journal, 1903, XXXIX, 379-395).

The Doctrine of Consideration, in English Law, by E. Jenks (London, 1892), cc. III, IV.

The Foundations of Legal Liability, by T. A. Street (Northport, 1906), vol. II, cc. I-IV, vol. III, cc. X-XVI.

59. THE HISTORY OF ASSUMPSIT[1]

By James Barr Ames[2]

I. — EXPRESS ASSUMPSIT

THE mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirement of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."[3] On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."[4] A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.[5]

To the present writer[6] it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not

[1] This Essay was first published in the Harvard Law Review, vol. II (1888), pp. 1-18, 53-69, 377-380. Additions made by the author on revising it for this Collection are enclosed in brackets.

[2] A biographical note of this author is prefixed to Essay No. 43, in Vol. II of this Collection.

[3] Holmes, Early English Equity, 1 L. Q. Rev. 171 *ante*, Essay No. 41; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

[4] Salmond, History of Contract, 3 L. Q. Rev. 166, 178 *infra*, Essay No. 61.

[5] Hare, Contracts, Ch. VII. and VIII.

[6] It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

have covered the cases of the sixteenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these, detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of assumpsit will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned;[1] against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient;[2] against a smith for laming a horse while shoeing it;[3] against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face;[4] against a carpenter who undertook to build well and faithfully, but who built unskilfully.[5]

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for cen-

[1] Y. B. 22 Ass. 94, pl. 41.

[2] Y. B. 43 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on the Case, 37; Y. B. 3 H. VI. 36, pl. 33; [Prior *v.* Rillesford, 17 Yorkshire Archeol. Soc'y. Record Series, 78] Y. B. 19 H. VI. 49, pl. 5; Y. B. 11 Ed. IV. 6, pl. 10; Powtuary *v.* Walton, 1 Roll. Ab. 10, pl. 5; Slater *v.* Baker, 2 Wils. 359; Sears *v.* Prentice, 8 East, 348.

[3] Y. B. 46 Ed. III. 19, pl. 19; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

[4] 14 H. VII. Rast. Ent. 2, b. 1.

[5] Y. B. 11 H. IV. 33, pl. 60; Y. B. 3 H. VI. 36, pl. 33; Y. B. 20 H. VI. 34, pl. 4; Y. B. 21 H. VI. 55, pl. 12; 18 H. VII. Keilw. 50, pl. 4; 21 H. VII. Keilw. 77, pl. 25; Y. B. 21 H. VII. 41, pl. 66; Coggs *v.* Bernard, 2 Ld. Ray. 909, 920; Elsee *v.* Gatward, 5 T. R. 143. See also Best *v.* Yates, 1 Vent. 268.

turies, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of the cases and precedents there is no mention of reward or consideration. In Powtuary *v.* Walton [1] (1598), a case against a farrier who undertook to cure the plaintiff's horse, and who treated it so negligently and unskilfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit*." The gist of the action being tort, and not contract, a servant,[2] a wife,[3] or a child,[4] who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of assumpsit against a farrier for laming the plaintiff's horse.[5] But in practice assumpsit was rarely, if ever, resorted to.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a cus-

[1] 1 Roll. Ab. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.
[2] Everard *v.* Hopkins, 2 Bulst. 332.
[3] Pippin *v.* Sheppard, 11 Price, 400.
[4] Gladwell *v.* Steggall, 5 B. N. C. 733.
[5] 2 Chitty, Pl. (7 ed.) 458.

tomary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor;[1] Newton, C. J.: "Perhaps he applied his medicines *de son bon gré*, and afterwards your horse died; now, since he did it *de son bon gré*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse dies; shall the plaintiff have an action? I say, No." Paston, J.: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C. J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.[2]

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."[3] This is, of course, not law to-day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year-Books.[4] The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions

[1] Y. B. 19 H. VI. 49, pl. 5.

[2] See to the same effect Y. B. 48 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on Case, 37; Rast. Ent. 463 b.

[3] 1 Bl. Com. 431.

[4] Y. B. 11 Ed. IV. 6, pl. 10; 1 Roll. Ab. 94, pl. 1; 1 Roll. Ab. 95, pl. 1.

on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of assumpsit. The normal remedy against a bailee was detinue. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in detinue might be defeated by the defendant's wager of law; if he had paid in advance for the safe custody of his property, he could not recover in detinue his money, but only the value of the property; detinue could not be brought in the King's Bench by original writ; and the procedure generally was less satisfactory than that in case. It is not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449.[1] The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note: . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,[2] and was expressly stated a few years later.[3]

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an

[1] Statham Ab. Act. on Case (27 H. VI.).
[2] Y. B. 12 Ed. IV. 13, pl. 10.
[3] Y. B. 2 H. VII. 11, pl. 9; Keilw. 77, pl. 25; Keilw. 160, pl. 2; Y. B. 27 H. VIII. 25, pl. 3.

actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII., Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case;[1] and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of Coggs *v.* Bernard. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special assumpsit was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I.[2] Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of declaring against a bailee.[3] Oddly enough, the earliest attempts to charge bailees in assumpsit were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.[4] The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in assumpsit on a gratuitous bailment.[5]

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity

[1] Keilw. 160, pl. 2 (1510).

[2] [As late as 1745, it was objected in Alcorn *v.* Westbrook 1 Wils. 115, that Assumpsit was not the proper form of action against a pledgee.]

[3] In Williams *v.* Lloyd, W. Jones, 179; Anon., Comb. 371; Coggs *v.* Bernard, 2 Ld. Ray. 909; Shelton *v.* Osborne, 1 Barnard. 260; 1 Selw. N. P. (13 ed.) 348, s. c.; Brown *v.* Dixon, 1 T. R. 274, the declarations were framed in tort.

[4] Howlet *v.* Osborne, Cro. El. 380; Riches *v.* Briggs, Cro. El. 883, Yelv. 4; Game *v.* Harvie, Yelv. 50; Pickas *v.* Guile, Yelv. 128. See, also, Gellye *v.* Clark, Noy, 126, Cro. Jac. 188, s. c.; and compare Smith's case, 3 Leon. 88.

[5] Wheatley *v.* Low, Palm. 281, Cro. Jac. 668, s. c.

of alleging an express *assumpsit* by the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against a common carrier[1] or innkeeper[2] for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. Frowyk, C. J., says, in 1505, that the bailee shall be charged "*per cest parol super se assumpsit.*"[3] In Fooley *v.* Preston,[4] Anderson, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in Mosley *v.* Fosset[5] (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie."[6] But

[1] 1 Roll. Ab. 2, pl. 4; Rich *v.* Kneeland, Hob. 17; 1 Roll. Ab. 6, pl. 4; Kenrig *v.* Eggleston, Al. 93; Nichols *v.* More, 1 Sid. 36; Morse *v.* Slue, 1 Vent. 190, 238; Levett *v.* Hobbs, 2 Show. 127; Chamberlain *v.* Cooke, 2 Vent. 75; Matthews *v.* Hoskins, 1 Sid. 244; Upshare *v.* Aidee, Com. 25; Herne's Pleader, 76; Brownl. Ent. 11; 2 Chitty, Pl. (1 ed.) 271.

[2] Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 H. IV. 7, pl. 31; Y. B. 11 H. IV. 45, pl. 18; Cross *v.* Andrews, Cro. El. 622; Gellye *v.* Clark, Cro. Jac. 189; Beedle *v.* Norris, Cro. Jac. 224; Herne's Pleader, 170, 249.

[3] Keilw. 77, pl. 25.

[4] 1 Leon. 297.

[5] Moore, 543, pl. 720; 1 Roll. Ab. 4, pl. 5, s. c. The criticism in Holmes' "Common Law," 155, n. 1, of the report of this case seems to be without foundation.

[6] See also Evans *v.* Yeoman (1635), Clayt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and

with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

Symons *v.* Darknoll [1] (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover;" Hyde, C. J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.[2]

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit.*"

another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former. Lothrop *v.* Thayer, 138 Mass. 466. This is an illustration of the rule that a tenant-at-will is not liable for negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the Countess of Salop *v.* Crompton, Cro. El. 777, 784, 5 Rep. 13, s. c., a case against a tenant-at-will, Gawdy, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him, but to occupy and pay his rent." So also in Coggs *v.* Bernard, 2 Ld. Ray. 909. Powell, J., referring to the case of the Countess of Salop, says: "An action will not lie against a tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally."

[1] Palm. 523. See, also, Stanian *v.* Davies, 2 Ld. Ray. 795.

[2] 2 Inst. Cler. 185; 2 Chitty, Pl. (7 ed.) 506, 507.

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,[1] the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.[2] How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant."[3] That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C. J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. Stuart *v.* Wilkins,[4] decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor's warranty.

We have seen that an express undertaking of the defendant was originally essential to the actions against surgeons or carpenters, and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the Book of Assises is commonly cited, it is true, to show that from very early times one who sold goods,

[1] Fitz. Ab. Monst. de Faits, pl. 160 (1383).
[2] Moor *v.* Russel, Skin. 104; 2 Show. 284, s. c.
[3] Y. B. 11 Ed. IV. 6, pl. 11.
[4] 3 Doug. 18.

knowing that he had no title to them, was liable in an action on the case for deceit.[1] This may have been the law.[2] But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.[3] Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other cases is illustrated by the familiar case of Chandelor *v.* Lopus [4] (1606-1607). The count alleged that the defendant sold to the defendant a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except Anderson, C. J.) holding "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in Bailie *v.* Merrill.[5] The case of Chandelor *v.* Lopus has recently found an able defender in the pages of this REVIEW. In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in Chandelor *v.* Lopus, if it had come before an English court of the present century.[6] But

[1] 3 Y. B. 42, Lib. Ass. pl. 8.

[2] But see Kenrick *v.* Burges, Moore, 126, per Gawdy, J., and Roswell *v.* Vaughan, Cro. Jac. 196, per Tanfield, C. B.

[3] Y. B. 9 H. VI. 53, pl. 37; Keilw. 91, pl. 16; Roswell *v.* Vaughan, Cro. Jac. 196; Burnby *v.* Bollett, 16 M. & W. 644, 654.

[4] Dy. 75 a, n. (23); Cro. Jac. 4.

[5] 1 Roll. R. 275. See also Leakins *v.* Clizard, 1 Keb. 522, per Jones.

[6] But see Crosse *v.* Gardner, 3 Mod. 261, Comb. 142, s. c.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

it is certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in Barr *v.* Gibson,[1] "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.[2] But in Lord Holt's time an affirmation was equivalent to a warranty,[3] and to-day a warranty of title is commonly implied from the mere fact of selling.[4]

However much the actions against a surgeon or carpenter for misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases, also, like the actions for a false warranty, were actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i. e.*, for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no specialty.[5] In the same reign there was a similar case with

[1] 3 M. & W. 390.

[2] Co. Lit. 102 a; Springwell *v.* Allen (1649) Al. 91, 2 East, 448, n. (a), s. c.

[3] Crosse *v.* Gardner, 3 Mod. 261; 1 Show. 65, s. c.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

[4] Eichholtz *v.* Bannister, 17 C. B. N. S. 708; Benj. Sale (3 ed.), 620-631.

[5] Y. B. 2 H. IV. 3, pl. 9.

the same result.[1] The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. Martin, J., like his predecessors, was against the action; Cockayne, J., favored it. Babington, C. J., at first agreed with Cockayne, J., but was evidently shaken by the remark of Martin, J.: "Truly, if this action is maintained, one shall have trespass for breach of any covenant [2] in the world," for he then said: "Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.[3] Martin, J., appears finally to have won over the Chief Justice to his view, for, eight years later, we find Babington, C. J., Martin and Cotesmore, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. Paston, J., showed an inclination to allow the action.[4] In 1435 he gave effect to this inclination, holding, with Juyn, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.[5] But this decision was ineffectual to change the law. Made without a precedent, it has had no following.

[1] Y. B. 11 H. IV. 33, pl. 60. See also [Wheler *v.* Huchynden, 2 Cal. Ch. II; Wall *v.* Breese, 10 Seld. Socy. No. 40 as in Y. B. 21 Hen. VI. 55, pl. 12; Diversitie of Courts, Chancerie; Sharington *v.* Stratton, Plow. 298; Page *v.* Moulton, Dy. 296, a, pl. 22] 7 H. VI. 1, pl. 3; [Anon. (1503) Keilw. 50, pl. 4].

[2] Covenant was often used in the old books in the sense of agreement, a fact sometimes overlooked, as in Hare, Contracts, 138, 139.

[3] Y. B. 3 H. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. Holmes, Common Law, 267, 285; Hare, Contracts, 162. The point was this: Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labor. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. Babington, C. J., and Cockayne, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

[4] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26.

[5] Y. B. 14 H. VI. 18, pl. 58.

The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.[1]

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is given, and the reader will notice the striking resemblance between its phraseology and the later count in assumpsit. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. Babington, C. J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." Cotesmore, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case." [2]

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before

[1] Y. B. 20 H. VI. 25, pl. 11, per Newton, C. J.; Y. B. 20 H. VI. 34, pl. 4, per Ayscoghe, J.; Y. B. 21 H. VI. 55, pl. 12, Y. B. 37 H. VI. 9, pl. 18, per Moyle, J.; Y. B. 2 H. VII. 11, pl. 9, and Y. B. 2 H. VII. 12, pl. 15, per Townsend, J.; 18 H. VII. Keilw. 50, pl. 4, per curiam; Doct. & St. Dial. II. c. 24; Coggs *v.* Bernard, 2 Ld. Ray. 909, 919, per Lord Holt; Elsee *v.* Gatward, 5 T. R. 143. Newton, C. J., said on several occasions (Y. B. 19 H. VI. 24 b, pl. 47; Y. B. 20 H. VI. 34, pl. 4; Y. B. 22 H. VI. 43, pl. 28) that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncrasy of that judge, for his premise was plainly false. There was no *quid pro quo* to create a debt [Fortescue dissented from Newton C. J. in Y. B. 20 Hen. VI. 35, pl. 4].

[2] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 H. VI. 25, pl. 11.

the Exchequer Chamber a few years later.[1] It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for £100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as Ayscoghe, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and Fortescue, J., accordingly thought the count bad. A majority of the judges, however, were in favor of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.[2] In 1487 Townsend, J., and Brian, C. J., agreed that a traverse of the feoffment to the stranger was a good traverse, since "that was the effect of the action, for otherwise the action could not be maintained."[3] In the following year,[4] the language of Brian, C. J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an actionable deceit

[1] Y. B. 20 H. VI. 34, pl. 4.
[2] Y. B. 16 Ed. IV. 9, pl. 7.
[3] Y. B. 2 H. VII. 12, pl. 15.
[4] Y. B. 3 H. VII. 14, pl. 20.

by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of Frowyk, C. J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies." [1]

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise.[2] This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1522, the student of

[1] Keilw. 77, pl. 25, which seems to be the same case as Y. B. 20 H. VII. 8, pl. 18. 21 H. VII. 41, pl. 66, per Fineux, C. J., *accord*. See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa*." Br. Ab. Disceit, pl. 29.

[2] Y. B. 12 H. VIII. 11, pl. 3.

law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it." [1] From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.[2]

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery; [3] and Fineux, C. J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to use a *subpœna* in such cases.[4]

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases.[5] In one of them, between 1377 and 1399, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpœna to compel the defendant to answer of his "disceit." [6] The bill sounds in tort

[1] Doct. and Stud. Dial. II. c. 24.

[2] Y. B. 27 H. VIII. 24, pl. 3; [Pecke *v.* Redman (1555), Dy. 113, the earliest reported case of assumpsit upon mutual promises]; Webb's Case (1578), 4 Leon. 110; Richards *v.* Bartlett (1584), 1 Leon. 19; Baxter *v.* Read (1585), 3 Dyer, 272, b. note; Foster *v.* Scarlett (1588), Cro. El. 70; Sturlyn *v.* Albany (1588), Cro. El. 57; [Kirby *v.* Eccles (1590) 1 Leon. 186]; Greenleaf *v.* Barker (1590), Cro. El. 193; Knight *v.* Rushworth (1596), Cro. El. 469; Bane's Case (1611), 9 Rep. 93, b. These authorities disprove the remark of Mr. Justice Holmes (Common Law, 287) that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (Summary of Contract, § 64) are open to similar criticism.

[3] Y. B. 21 Ed. IV. 23, pl. 6.

[4] Y. B. 21 H. VII. 41, pl. 66.

[5] [Two other cases are given by Mr. S. R. Bird in the Antiquary vol. IV, p. 185 and vol. V, p. 38. See 8 Harv. L. Rev. 256; *infra*, Essay No. 60.]

[6] 2 Cal. Ch. II.

rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. Appilgarth *v.* Sergeantson [1] (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit." [2] The remaining case, thirty years later,[3] does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpœna.

Both in equity [4] and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.[5] By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.[6] Damages were soon assessed, not upon the

[1] 1 Cal. Ch. XLI.

[2] An action on the case was allowed under similar circumstances in 1505, Anon., Cro. El. 79 (cited).

[3] Y. B. 8 Ed. IV. 4, pl. 11.

[4] The Chancellor (Stillington) says, it is true, that a subpœna will lie against a carpenter for breach of his promise to build. But neither this remark, nor the statement in Diversity of Courts, Chancerie, justifies a belief that equity ever enforced gratuitous parol promises [8 Harv. L. Rev. 255-258, *Infra,* Essay No. 60]. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Ab. Act. on Case, pl. 72. [See 1 Ames, Cas. in Eq. Jur. 37 n. 3.] The invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1522. Doct. & St. Dial. II. Ch. 22, 23, and 24. [See similar statements in A Little Treatise Concerning Writs of Subpœna. Doct. & St. (18 ed.) Appendix, 17, Hargrave L. Tr., 334, which was written shortly after 1523.]

[5] Y. B. 27 H. VIII. 24, 25, pl. 3; Sidenham *v.* Worlington, 2 Leon. 224; Banks *v.* Thwaites, 3 Leon. 73; Shandois *v.* Simpson, Cro. El. 880; Sands *v.* Trevilian, Cro. Car. 107, 193. [Doct. & St. Dial. II. Ch. 23 and 24; Bret *v.* J. S. Cro. El. 756; Milles *v.* Milles, Cro. Car. 241; Jordan *v.* Tompkins, 6 Mod. 77. Contract meant originally what we now call a real contract, that is, a contract arising from the receipt of a *quid pro quo,* in other words, a debt. See 8 Harv. L. Rev. 253, n. 3, *Infra,* Essay No. 60.]

[6] Williams *v.* Hide, Palm. 548, 549; Wirral *v.* Brand, 1 Lev. 165.

theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the personal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.[1] Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a disceit alleged."[2] Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."[3] This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,[4] which persisted to the present century, is an unmistakeable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first proclaimed by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,[5] decided in 1603, is commonly thought to be the source of this action.[6] But this is a mis-

[1] Legate *v.* Pinchion, 9 Rep. 86; Sanders *v.* Esterby, Cro. Jac. 417.
[2] Corby *v.* Brown, Cro. El. 470; Elrington *v.* Doshant, 1 Lev. 142.
[3] Common Pleas, 53.
[4] In Impey's King's Bench (5 ed.), 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."
[5] 4 Rep. 92 a; Yelv. 21; Moore, 433, 667.
[6] Langdell, Cont. § 48; Pollock, Cont. (4 ed.) 144; Hare, Cont. 136, 137; Salmond, 3 L. Q. Rev. 179, *infra*, Essay No. 61.

apprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.[1] The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."[2] In Manwood *v.* Burston[3] (1588), Manwood, C. B., speaks of "three manners of considerations upon which an assumpsit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor . . . (3) or there is a present consideration."[4]

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.[5] The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.[6] But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

Indebitatus assumpsit, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent

[1] Br. Ab. Act. on Case, pl. 105 (1542).
[2] Br. Ab. Act. on Case, pl. 5.
[3] 2 Leon. 203, 204.
[4] See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill *v.* Harwood (C. B. 1587), 1 Leon, 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. Ashbrooke *v.* Snape (B. R. 1591), Cro. El. 240. But this decision was not followed.
[5] Edwards *v.* Burr (1573), Dal. 104; Anon. (1583), Godb. 13; Estrigge *v.* Owles (1589), 3 Leon. 200.
[6] Hinson *v.* Burridge, Moore, 701; Turges *v.* Beecher, Moore, 694; Paramour *v.* Payne, Moore, 703; Maylard *v.* Kester, Moore, 711.

with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i. e.*, *quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice, in pleading, to lay all assumpsits as made *in consideratione* of the detriment or debt.[1] And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.[2]

[1] In Joscelin *v.* Sheldon (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear [In Whorwood *v.* Gibbons (1577), Goldsb. 48, Leon. 61, s. c., it was said by the Court to be "a Common Courte in actions upon the case against him, by whom the debt is due, to declare without any words *in consideratione*"].

[2] See also Mr. Salmond's criticism of this theory, in 3 L. Q. Rev. 178; *infra*, Essay No. 61.

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.[1] Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitively established.[2] But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor or covenantor.[3] The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,[4] it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation

[1] 31 H. VI. Fitz. Ab. Subp. pl. 23; Fowler *v.* Iwardby, 1 Cal. Ch. LXVIII.; Pole *v.* Richard, 1 Cal. Ch. LXXXVIII.; Y. B. 20 H. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.

[2] Y. B. 21 VIII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1565, of Sharrington *v.* Strotton, Plow. 295. [See 2 Sel. Ess. Ang. Am. Leg. Hist. 746.]

[3] Plow. 298, 308; Buckley *v.* Simonds, Winch, 35-37, 59, 61; Hore *v.* Dix, 1 Sid. 25, 27; Pybus *v.* Mitford, 2 Lev. 75, 77.

[4] That a debt, as suggested by Professor Langdell (Contracts, § 100), was regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. Chawner v. Bowes, Godb. 217. See, also, 1 Roll. Ab. 518, pl. 2 and 3; Brown *v.* Hancock, Hetl. 110, 111, *per Barkley*. [In Evans *v.* Thomas, Cro. Jac. 172, Tanfield J. said of a covenant that A should have a certain flock of sheep: "the covenant is a grant." Similarly Coke C. J. in Rutland's Case 2 Brownl. 338.]

so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.[1]

II. — IMPLIED ASSUMPSIT

Nothing impresses the student of the Common Law more than its extraordinary conservatism. The reader will easily call to mind numerous rules in the law of Real Property and Pleading which illustrate the persistency of archaic reverence for form and of scholastic methods of interpretation. But these same characteristics will be found in almost any branch of the law by one who carries his investigations as far back as the beginning of the seventeenth century. The history of Assumpsit, for example, although the fact seems to have escaped general observation, furnishes a convincing illustration of the vitality of mediæval conceptions.

We have had occasion, in the preceding part of this paper, to see that an express *assumpsit* was for a long time essential in the actions of tort against surgeons or carpenters, and bailees. It also appeared that in the action of tort for a false warranty the vendor's affirmation as to quality or title was not admissible, before the time of Lord Holt, as a substitute for an express undertaking. We are quite prepared, therefore, to find that the action of Assumpsit proper was, for generations, maintainable only upon an express promise. Furthermore, Assumpsit would not lie in certain cases even though there were an express promise. For example, a defendant who promised to pay a sum certain in exchange for a *quid pro quo* was, before Slade's case,[2] chargeable only in Debt unless he made a second promise to pay the debt.

It was only by degrees that the scope of the action was enlarged. The extension was in three directions. In the first place, *Indebitatus Assumpsit* became concurrent with Debt upon a simple contract in all cases. Secondly, proof

[1] Bacon, St. of Uses (Rowe's ed.), 13-14. [See 8 Harv. L. Rev. 259, *Infra*, Essay No. 60.]

[2] 4 Rep. 92 a.

of a promise implied in fact, that is, a promise inferred from circumstantial evidence, was at length deemed sufficient to support an action. Finally, *Indebitatus Assumpsit* became the appropriate form of action upon constructive obligations, or quasi-contracts for the payment of money. These three developments will be considered separately.

Although *Indebitatus Assumpsit* upon an express promise was valuable so far as it went, it could not be resorted to by plaintiffs in the majority of cases as a protection from wager of law by their debtors. For the promise to be proved must not only be express, but subsequent to the debt. In an anonymous case, in 1572, Manwood objected to the count that the plaintiff "ought to have said *quod postea assumpsit*, for if he assumed at the time of the contract, then Debt lies, and not Assumpsit; but if he assumed after the contract, then an action lies upon the *assumpsit*, otherwise not, *quod* Whiddon and Southcote, JJ., with the assent of Catlin, C. J. *concesserunt*." [1] The consideration in this class of cases was accordingly described as a "debt precedent." [2] The necessity of a subsequent promise is conspicuously shown by the case of Maylard *v.* Kester.[3] The allegations of the count were, that, in consideration that the plaintiff would sell and deliver to the defendant certain goods, the latter promised to pay therefor a certain price; that the plaintiff did sell and deliver the goods, and that the defendant did not pay according to his promise and undertaking. The plaintiff had a verdict and judgment thereon in the Queen's Bench; but the judgment was reversed in the Exchequer Chamber "because Debt lies properly, and not an action on the case; the matter proving a perfect sale and contract."

What was the peculiar significance of the subsequent promise? Why should the same courts which, for sixty years before Slade's case, sanctioned the action of Assumpsit upon a promise in consideration of a precedent debt, refuse, during the same period, to allow the action, when the receipt of the *quid pro quo* was contemporaneous with or subsequent

[1] Dal. 84, pl. 35.
[2] Manwood *v.* Burston, 2 Leon. 203, 204; *supra*, 16, 17.
[3] Moore, 711 (1601).

to the promise? The solution of this puzzle must be sought, it is believed, in the nature of the action of Debt. A simple contract debt, as well as a debt by specialty, was originally conceived of, not as a contract, in the modern sense of the term, that is, as a promise, but as a grant.[1] A bargain and sale, and a loan, were exchanges of values. The action of debt, as several writers have remarked, was a real rather than a personal action. The judgment was not for damages, but for the recovery of a debt, regarded as a *res*. The conception of a debt was clearly expressed by Vaughan, J., who, some seventy years after Slade's case, spoke of the action of Assumpsit as "much inferior and ignobler than the action of Debt," and characterized the rule that every contract executory implies a promise as "a false gloss, thereby to turn actions of Debt into actions on the case; for contracts of debt are reciprocal grants."[2]

Inasmuch as the simple contract debt had been created from time immemorial by a promise or agreement to pay a definite amount of money in exchange for a *quid pro quo*, the courts could not allow an action of Assumpsit also upon such a promise or agreement, without admitting that two legal relations, fundamentally distinct, might be produced by one and the same set of words. This implied a liberality of interpretation to which the lawyers of the sixteenth century had not generally attained. To them it seemed more natural to consider that the force of the words of agreement was spent in creating the debt. Hence the necessity of a new promise, if the creditor desired to charge his debtor in Assumpsit.

As the actions of Assumpsit multiplied, however, it would naturally become more and more difficult to discriminate between promises to pay money and promises to do other things. The recognition of an agreement to pay money for a *quid pro quo* in its double aspect, that is, as being both a grant and a promise, and the consequent admissibility of Assumpsit, with its procedural advantages, as a concurrent

[1] See Langdell, Contracts, § 100.

[2] Edgecomb *v.* Dee, Vaugh. 89, 101. ["Si homme countast simplement d'un graunte d'un dette, il ne sera mye resceu saunz especialte." Per Sharshulle, J., Y. B. 11 & 12 Ed. III 587.]

remedy with Debt, were inevitable. It was accordingly resolved by all the justices and barons in Slade's case, in 1603, although "there was no other promise or assumption but the said bargain," that "every contract executory imports in itself an *assumpsit*, for when one agrees to pay money, or to deliver anything, thereby he assumes or promises to pay or deliver it; and, therefore, when one sells any goods to another, and agrees to deliver them at a day to come, and the other, in consideration thereof, agrees to pay so much money at such a day, in that case both parties may have an action of Debt, or an action on the case on *assumpsit*, for the mutual executory agreement of both parties imports in itself reciprocal actions upon the case as well as actions of Debt." Inasmuch as the judges were giving a new interpretation to an old transaction; since they, in pursuance of the presumed intention of the parties, were working out a promise from words of agreement which had hitherto been conceived of as sounding only in grant, it was not unnatural that they should speak of the promise thus evolved as an "implied *assumpsit*." But the promise was in no sense a fiction. The fictitious *assumpsit*, by means of which the action of *Indebitatus Assumpsit* acquired its greatest expansion, was an innovation many years later than Slade's case.

The account just given of the development of *Indebitatus Assumpsit*, although novel, seems to find confirmation in the parallel development of the action of Covenant. Strange as it may seem, Covenant was not the normal remedy upon a covenant to pay a definite amount of money or chattels. Such a covenant being regarded as a grant of the money or chattels, Debt was the appropriate action for their recovery. The writer has discovered no case in which a plaintiff succeeded in an action of Covenant, where the claim was for a sum certain, antecedent to the seventeenth century; but in an action of Debt upon such a claim, in the Queen's Bench, in 1585, "it was holden by the Court that an action of Covenant lay upon it, as well as an action of Debt, at the election of the plaintiff." [1] The same right of election was conceded

[1] Anon. (1585) 3 Leon. 119. [*Per Curiam.* "If one covenant to pay me £100 at such a day, an action of debt lieth, *a fortiori* when the

by the Court in two cases [1] in 1609, in terms which indicate that the privilege was of recent introduction. It does not appear in what court these cases were decided; but it seems probable that they were in the King's Bench, for, in Chawner *v.* Bowes,[2] in the Common Bench, four years later, Warburton and Nichols, JJ., said: "If a man covenant to pay £10 at a day certain, an action of debt lieth for the money, and not an action of covenant." As late as 1628, in the same court, Berkeley, Serjeant, in answer to the objection that Covenant did not lie, but Debt, against a defendant who had covenanted to perform an agreement, and had obliged himself in a certain sum for its performance, admitted that, "if a covenant had been for £30, then debt only lies; but here it is to perform an agreement." [3] Precisely when the Common Bench adopted the practice of the King's Bench it is, perhaps, impossible to discover; but the change was probably effected before the end of the reign of Charles I.

That Covenant became concurrent with Debt on a specialty so many years after Assumpsit was allowed as a substitute for Debt on a simple contract, was doubtless due to the fact that there was no wager of law in Debt on a sealed obligation.

Although the right to a trial by jury was the principal reason for a creditor's preference for *Indebitatus Assumpsit*, the new action very soon gave plaintiffs a privilege which must have contributed greatly to its popularity. In declaring in Debt, except possibly upon an account stated, the plaintiff was required to set forth his cause of action with great particularity. Thus, the count in Debt must state the quantity and description of goods sold, with the details of the price, all the particulars of a loan, the names of the persons to whom money was paid with the amounts of each payment, the names of the persons from whom money was re-

words of the deed are covenant and grant, for the word covenant sometimes sounds in covenant, sometimes in contract *secundum subjectam materiam.*" Anon. (1591) 1 Leon. 208, pl. 290.]

[1] Anon., 1 Roll. Ab. 518, pl. 3; Strong *v.* Watts, 1 Roll. Ab. 518, pl. 2. See also Mordant *v.* Watts, Brownl. 19; Anon., Sty. 31; Frere *v.* ——, Sty. 133; Norrice's Case, Hard. 178.

[2] Godb. 217.

[3] Brown *v.* Hancock, Hetl. 110, 111. [But in Sicklemore *v.* Simonds, (1600) Cro. El. 797 the Common Bench said lessor might have his option of debt or covenant upon the lessee's covenant to pay the rent.]

ceived to the use of the plaintiff with the amounts of each receipt, the precise nature and amount of services rendered. In *Indebitatus Assumpsit*, on the other hand, the debt being laid as an inducement or conveyance to the *assumpsit*, it was not necessary to set forth all the details of the transaction from which it arose. It was enough to allege the general nature of the indebtedness, as for goods sold,[1] money lent,[2] money paid at the defendant's request,[3] money had and received to the plaintiff's use,[4] work and labor at the defendant's request,[5] or upon an account stated,[6] and that the defendant being so indebted promised to pay. This was the origin of the common counts.

In all the cases thus far considered there was a definite bargain or agreement between the plaintiff and defendant. But instances, of course, occurred in which the parties did not reduce their transactions to the form of a distinct bargain. Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at the present day, but for centuries there was no common-law action by which compensation could be recovered. Debt could not be maintained, for that action was always for the recovery of a liquidated amount.[7] Assumpsit would not lie for want of a promise. There was confessedly no express promise; to raise by implication a promise to pay as much as the plaintiff reasonably deserved for his goods or services was to break with the most venerable traditions. The lawyer of to-day, familiar with the

[1] Hughes *v.* Rowbotham (1592), Poph. 30, 31; Woodford *v.* Deacon (1608), Cro. Jac. 206; Gardiner *v.* Bellingham (1612), Hob. 5, 1 Roll. R. 24, s. c.

[2] Rooke *v.* Rooke, (1610), Cro. Jac. 245, Yelv. 175, s. c.

[3] Rooke *v.* Rooke, *supra;* Moore *v.* Moore (1611), 1 Bulst. 169.

[4] Babington *v.* Lambert (1616), Moore, 854.

[5] Russell *v.* Collins (1669), 1 Sid. 425, 1 Mod. 8, 1 Vent. 44, 2 Keb. 552, s. c.

[6] Brinsley *v.* Partridge (1611), Hob. 88; Vale *v.* Egles (1605), Yelv. 70, Cro. Jac. 69.

[7] "If I bring cloth to a tailor to have a cloak made, if the price is not ascertained beforehand that I shall pay for the work, he shall not have an action against me." Y. B. 12 Ed. IV. 9, pl. 22, per Brian, C. J. To the same effect, Young *v.* Ashburnham (1587), 3 Leon. 161; Mason *v.* Welland (1688), Skin. 238, 242.

ethical character of the law as now administered, can hardly fail to be startled when he discovers how slowly the conception of a promise implied in fact, as the equivalent of an express promise, made its way in our law.

There seems to have been no recognition of the right to sue upon an implied *quantum meruit* before 1609. The innkeeper was the first to profit by the innovation. Reciprocity demanded that, if the law imposed a duty upon the innkeeper to receive and keep safely, it should also imply a promise on the part of the guest to pay what was reasonable.[1] The tailor was in the same case with the innkeeper, and his right to recover upon a *quantum meruit* was recognized in 1610.[2] Sheppard,[3] citing a case of the year 1632, says: "If one bid me do work for him, and do not promise anything for it; in that case the law implieth the promise, and I may sue for the wages." But it was only four years before that the Court in a similar case were of opinion that an action lay if the party either before or after the services rendered promised to pay for them, "but not without a special promise."[4] In Nichols *v.* More[5] (1661) a common carrier resisted an action for negligence, because, no price for the carriage being agreed upon, he was without remedy against the bailor. The Court, however, answered that "the carrier may declare upon a *quantum meruit* like a tailor, and therefore shall be charged."[6] As late as 1697, Powell, J., speaking of the sale of goods for so much as they were worth, thought it worth while to add: "And note the very taking up of the goods implies such a contract."[7]

[1] "It is an implied promise of every part, that is, of the part of the innkeeper, that he will preserve the goods of his guest, and of the part of the guest, that he will pay all duties and charges which he caused in the house." Warbrooke *v.* Griffin, 2 Brownl. 254, Moore, 876, 877, s. c.

[2] Six Carpenters' Case, 8 Rep. 147 a. But the statement that the tailor could recover in Debt is contradicted by precedent and following authorities.

[3] Actions on the Case (2 ed.), 50. [Shepp. Faithf. Counsellor, (2 ed.) 125.]

[4] Thursby *v.* Warren, W. Jones, 208.

[5] 1 Sid. 36. See also Boson *v.* Sandford (1689), per Eyres, J.

[6] The defendant's objection was similar to the one raised in Y. B. 8 H. VI. 36, pl. 33, *supra*, 11, n. 2.

[7] Hayward *v.* Davenport, Comb. 426.

The right of one, who signed a bond as surety for another without insisting upon a counter bond or express promise to save harmless, to charge his principal upon an implied contract of indemnity, was developed nearly a century later. In Bosden *v.* Thinne[1] (1603) the plaintiff at the defendant's request had executed a bond as surety for one F, and had been cast in a judgment thereon. The judges all agreed that upon the first request only Assumpsit did not lie, Yelverton, J. adding: "For a bare request does not imply any promise, as if I say to a merchant, I pray trust J. S. with £100, and he does so, this is of his own head, and he shall not charge me, unless I say I will see you paid, or the like." The absence of any remedy at law was conceded in 1662.[2] It was said by Buller, J., in Toussaint *v.* Martinnant,[3] that the first case in which a surety, who had paid the creditor, succeeded in an action at law against the principal for indemnity, was before Gould, J.,[4] at Dorchester, "which was decided on equitable grounds." The innovation seems to be due, however, to Lord Mansfield, who ruled in favor of a surety in Decker *v.* Pope, in 1757, "observing that when a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law."[5]

The late development of the implied contract to pay *quantum meruit*, and to indemnify a surety, would be the more surprising, but for the fact that Equity gave relief to tailors and the like, and to sureties long before the common law helped them. Spence, although at a loss to account for the jurisdiction, mentions a suit brought in Chancery, in 1567, by a tailor, to recover the amount due for clothes furnished. The suit was referred to the queen's tailor, to ascertain the amount due, and upon his report a decree was made. The

[1] Yelv. 40.

[2] Scott *v.* Stephenson, 1 Lev. 71, 1 Sid. 89, s. c. But see Shepp. Act. on Case (2 ed.) 49.

[3] 2 T. R. 100, 105.

[4] Justice of the Common Pleas, 1763-1794.

[5] 1 Sel. N. P. (13 ed.) 91. [Lord Eldon said in Stirling *v.* Forrester, 3 Bligh, 575, 590: "Until I became acquainted with that case [Exall *v.* Partridge, (1799) 8 T. R. 310] I thought the remedy must be in equity."]

learned writer adds that "there were suits for wages and many others of like nature." [1] A surety who had no counter bond filed a bill against his principal, in 1632, in a case which would seem to have been one of the earliest of the kind, for the reporter, after stating that there was a decree for the plaintiff, adds "*quod nota.*" [2]

The account just given of the promise implied in fact seems to throw much light upon the doctrine of "executed consideration." One who had incurred a detriment at the request of another, by rendering service, or by becoming a surety with the reasonable expectation of compensation or indemnity, was as fully entitled, in point of justice, to enforce his claim at law, as one who had acted in a similar way upon the faith of an express promise. Nothing was wanting but an express *assumpsit* to make a perfect cause of action. If the defendant saw fit to make an express *assumpsit*, even after the detriment was incurred, the temptation to treat this as removing the technical objection to the plaintiff's claim at law might be expected to be, as it proved to be, irresistible.[3] The already established practice of suing upon a promise to pay a precedent debt, made it the more easy to support an action upon a promise when the antecedent act of the plaintiff at the defendant's request did not create a strict debt.[4] To bring the new doctrine into harmony with the accepted theory of consideration, the promise was "coupled with" the prior request by the fiction of relation,[5] or, by a

[1] 1 Spence, Eq. Jur. 694. [Daie *v.* Hampden (1628) Toth. 174. "Concerning salary for a cure."]

[2] Ford *v.* Stobridge, Nels. Ch. 24. [In 1613, in Wormlington *v.* Evans, Godb. 243, a surety was denied the right of contribution even in equity. The right was given, however, early in the reign of Charles I. Fleet *v.* Charnock (1630), Nels. 10, Toth. 41 s. c.; Parkhurst *v.* Bathurst (1630), Toth. 41; Wilcox *v.* Dunsmore (1637), Toth. 41. The first intimation of a right to contribution at law is believed to be the *dictum* of Lord Kenyon in Turner *v.* Davies (1796), 2 Esp. 479. The right to contribution at law was established in England by Cowell *v.* Edwards (1800) 2 B. & P. 268. But in North Carolina, in 1801, a surety failed because he proceeded at law instead of in equity. Carrington *v.* Carson, Cam. & Nor. Conf. R. 216.]

[3] The view here suggested is in accordance with what has been called, in a questioning spirit, the "ingenious explanation" of Professor Langdell. Holmes, Common Law, 286. The general tenor of this paper will serve, it is hoped, to remove the doubts of the learned critic.

[4] Sidenham *v.* Worlington (1585), 2 Leon. 224.

[5] Langdell, Contracts, § 92.

similar fiction, the consideration was brought forward or continued to the promise.[1] This fiction doubtless enabled plaintiffs sometimes to recover, although the promise was not identical with what would be implied, and in some cases even where it would be impossible to imply any promise.[2] But after the conception of a promise implied in fact was recognized and understood, these anomalies gradually disappeared, and the subsequent promise came to be regarded in its true light of cogent evidence of what the plaintiff deserved for what he had done at the defendant's request.

The non-existence in early times, of the promise implied in fact, also makes intelligible a distinction in the law of lien, which greatly puzzled Lord Ellenborough and his colleagues. Williams, J., is reported to have said in 1605: "If I put my cloths to a tailor to make up, he may keep them till satisfaction for the making. But if I contract with a tailor that he shall have so much for the making of my apparel, he cannot keep them till satisfaction for the making."[3] In the one case, having no remedy by action, he was allowed a lien, to prevent intolerable hardship. In the other, as he had a right to sue on the express agreement, it was not thought necessary to give him the additional benefit of a lien.[4] As soon as the right to recover upon an implied *quantum meruit* was admitted, the reason for this distinction vanished. But the acquisition of a new remedy by action did not displace the old remedy by lien.[5] The old rule, expressed, however, in the new form of a distinction between an express and an implied contract, survived to the present century.[6] At length, in

[1] Langdell, Contracts, § 92; 1 Vin. Ab. 280, pl. 13.

[2] Langdell, Contracts, §§ 93, 94.

[3] 2 Roll. Ab. 92, pl. 1, 2.

[4] An innkeeper had the further right of selling a horse as soon as it had eaten its value, if there were no express contract. For, as he had no right of action for its keep, the horse thereafter was like a *damnosa hereditas*. The Hostler's case (1605), Yelv. 66, 67. This right of sale disappeared afterwards with the reason upon which it was founded. Jones *v.* Pearle, 1 Stra. 556.

[5] "And it was resolved that an innkeeper may detain a horse for his feeding, and yet he may have an action on the case for the meat." Watbrooke *v.* Griffith (1609), Moore, 876, 877, 2 Brownl. 254 s. c.

[6] Chapman *v.* Allen, Cro. Car. 271; Collins *v.* Ongly, Selw. N. P. (13 ed.) 1312, n. (x), per Lord Holt; Brennan *v.* Currint (1755), Say. 224, Buller, N. P. (7 ed.) 45, n. (c); Cowell *v.* Simpson, 16 Ves. 275, 281, per Lord Eldon; Scarfe *v.* Morgan, 4 M. & W. 270, 283, per Parke, B.

1816, the judges of the King's Bench, unable to see any reason in the distinction, and unaware of its origin, declared the old *dicta* erroneous, and allowed a miller his lien in the case of an express contract.[1]

The career of the agistor's lien is also interesting. That such a lien existed before the days of implied contracts is intrinsically probable, and is also indicated by several of the books.[2] But in Chapman *v.* Allen [3] (1632), the first reported decision involving the agistor's right of detainer, there happened to be an express contract, and the lien was accordingly disallowed. When a similar case arose two centuries later in Jackson *v.* Cummins,[4] this precedent was deemed controlling, and, as the old distinction between express and implied contracts was no longer recognized, the agistor ceased to have a lien in any case. Thus was established the modern and artificial distinction in the law of lien between bailees for agistment and "bailees who spend their labor and skill in the improvement of the chattels" delivered to them.[5]

The value of the discovery of the implied promise in fact was exemplified further in the case of a parol submission to an award. If the arbitrators awarded the payment of a sum of money, the money was recoverable in debt, since an award, after the analogy of a judgment, created a debt. But if the award was for the performance of a collateral act, as, for example, the execution of a release, there was, originally, no mode of compelling compliance with the award, unless the parties expressly promised to abide by the decision of the arbitrators. Tilford *v.* French [6] (1663) is a case in point. So, also, seven years later, "it was said by Twisden, J., that if two submit to an award, this contains not a reciprocal promise to perform; but there must be an express promise

[1] Chase *v.* Westmore, 5 M. & Sel. 180.

[2] 2 Roll. Ab. 85, pl. 4 (1604); Mackerney *v.* Erwin (1628), Hutt. 101; Chapman *v.* Allen (1632), 2 Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c. [Bro. Ab. Distresse, 67.]

[3] Roll. Ab. 92, pl. 6, Cro. Car. 271, s. c.

[4] 5 M. & W. 342.

[5] The agistor has a lien by the Scotch law. Schouler, Bailments (2 ed.), § 122.

[6] 1 Lev. 113, 1 Sid. 160, 1 Keb. 599, 635. To the same effect, Penruddock *v.* Monteagle (1612), 1 Roll. Ab. 7, pl. 3; Browne *v.* Downing (1620), 2 Roll. R. 194; Read *v.* Palmer (1648), Al. 69, 70.

to ground an action upon."[1] This doctrine was abandoned by the time of Lord Holt, who, after referring to the ancient rule, said: "But the contrary has been held since; for if two men submit to the award of a third person, they do also thereby promise expressly to abide by his determination, for agreeing to refer is a promise in itself."[2]

In the cases already considered the innovation of Assumpsit upon a promise implied in fact gave a remedy by action, where none existed before. In several other cases the action upon such a promise furnished not a new, but a concurrent remedy. Assumpsit, as we have seen,[3] was allowed, in the time of Charles I., in competition with Detinue and Case against a bailee for custody. At a later period Lord Holt suggested that one might "turn an action against a common carrier into a special assumpsit (which the law implies) in respect of his hire."[4] Dale *v.* Hall[5] (1750) is understood to have been the first reported case in which that suggestion was followed. Assumpsit could also be brought against an innkeeper.[6]

Account was originally the sole form of action against a factor or bailiff. But in Wilkins *v.* Wilkins[7] (1689) three of the judges favored an action of Assumpsit against a factor because the action was brought upon an express promise, and not upon a promise by implication. Lord Holt, however, in the same case, attached no importance to the distinction between an express and an implied promise, remarking that "there is no case where a man acts as bailiff, but he promises to render an account."[8] The requisite of an express promise

[1] Anon., 1 Vent. 69.

[2] Squire *v.* Grevell (1703), 6 Mod. 34, 35. See similar statements by Lord Holt in Allen *v.* Harris (1695), 1 Ld. Ray. 122; Freeman *v.* Barnard (1696), 1 Ld. Ray. 248; Purslow *v.* Baily (1704), 2 Ld. Ray. 1039; Lupart *v.* Welson (1708), 11 Mod. 171.

[3] *Supra*, 7.

[4] Comb. 334.

[5] 1 Wils. 281. See, also, Brown *v.* Dixon, 1 T. R. 274, per Buller, J. [And yet in Powell *v.* Layton (1806) 2 B. & P. N. R. 365, 370, Sir J. Mansfield said: "How an action against a carrier on the custom ever came to be considered an action in tort I do not understand."]

[6] Morgan *v.* Ravey, 6 H. & N. 265. But see Stanley *v.* Bircher, 78 Mo. 245.

[7] Carth. 89, 1 Salk. 9.

[8] [But in Spurraway *v.* Rogers (1700), Lord Holt is reported as allowing assumpsit against a factor only upon an express promise.]

was heard of no more. Assumpsit became theoretically concurrent with Account against a bailiff or factor in all cases, although by reason of the competing jurisdiction of equity, actions at common law were rare.[1]

In the early cases of bills and notes the holders declared in an action on the case upon the custom of merchants. "Afterwards they came to declare upon an *assumpsit*."[2]

It remains to consider the development of *Indebitatus Assumpsit* as a remedy upon quasi-contracts, or, as they have been commonly called, contracts implied in law. The contract implied in fact, as we have seen, is a true contract. But the obligation created by law is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor. It resembles the true contract, however, in one important particular. The duty of the obligor is a positive one, that is, to act. In this respect they both differ from obligations the breach of which constitutes a tort, where the duty is negative, that is, to forbear. Inasmuch as it has been customary to regard all obligations as arising either *ex contractu* or *ex delicto*, it is readily seen why obligations created by law should have been treated as contracts. These constructive duties are more aptly defined in the Roman law as obligations *quasi ex contractu* than by our ambiguous "implied contracts."[3]

Quasi-contracts are founded (1) upon a record, (2) upon a statutory, official, or customary duty, or (3) upon the fundamental principle of justice that no one ought unjustly to enrich himself at the expense of another.

As Assumpsit cannot be brought upon a record, the first class of quasi-contracts need not be considered here. Many of the statutory, official, or customary duties, also, *e. g.*, the duty of the innkeeper to entertain,[4] of the carrier to carry,[5]

[1] Tompkins *v.* Willshaer, 5 Taunt. 430.
[2] Milton's Case (1668), Hard. 485, per Lord Hale.
[3] In Finch, Law, 150, they are called "as it were" contracts.
[4] Keil. 50, pl. 4.
[5] Jackson *v.* Rogers, 2 Show. 327; Anon., 12 Mod. 3.

of the smith to shoe,[1] of the chaplain to read prayers, of the rector to keep the rectory in repair,[2] of the *fidei-commiss* to maintain the estate,[3] of the finder to keep with care,[4] of the sheriff and other officers to perform the functions of their office,[5] of the ship-owner to keep medicines on his ship,[6] and the like, which are enforced by an action on the case, are beyond the scope of this essay, since *Indebitatus Assumpsit* lies only where the duty is to pay money [or a definite amount of chattels]. For the same reason we are not concerned here with a large class of duties growing out of the principle of unjust enrichment, namely, constructive or quasi trusts, which are enforced, of course, only in equity.

Debt was originally the remedy for the enforcement of a statutory or customary duty for the payment of money. The right to sue in *Indebitatus Assumpsit* was gained only after a struggle. The *assumpsit* in such cases was a pure fiction. These cases were not, therefore, within the principle of Slade's case, which required, as we have seen,[7] a genuine agreement. The authorities leave no room for doubt upon this point, although it is a common opinion that, from the time of that case, *Indebitatus Assumpsit* was concurrent with Debt in all cases, unless the debt was due by record, specialty, or for rent.

The earliest reported case of *Indebitatus Assumpsit* upon a customary duty seems to be City of London *v.* Goree,[8] decided seventy years later than Slade's case. "Assumpsit for money due by custom for scavage. Upon *non-Assumpsit* the jury found the duty to be due, but that no promise was expressly made. And whether Assumpsit lies for this money thus due by custom, without express promise, was the question. Resolved it does." On the authority of that case, an officer of a corporation was charged in Assumpsit, three

[1] Steinson *v.* Heath, Lev. 400.
[2] Bryan *v.* Clay, 1 E. & B. 38.
[3] Batthyany *v.* Walford, 36 Ch. Div. 269.
[4] Story, Bailments (8 ed.), §§ 85-87.
[5] 3 Bl. Com. 165.
[6] Couch *v.* Steel, 3 E. & B. 402. But see Atkinson *v.* Newcastle Co., 2 Ex. Div. 441.
[7] *Supra*, 55, 56.
[8] 2 Lev. 174, 1 Vent. 298, 3 Keb. 677, Freem. 433, s. c.

years later, for money forfeited under a by-law.[1] So, also, in 1688, a copyholder was held liable in this form of action for a customary fine due on the death of the lord, although it was objected "that no *Indebitatus Assumpsit* lieth where the cause of action is grounded on a custom."[2] Lord Holt had not regarded these extensions of *Indebitatus Assumpsit* with favor.[3] Accordingly, in York *v.* Toun,[4] when the defendant urged that such an action would not lie for a fine imposed for not holding the office of sheriff, "for how can there be any privity of assent implied when a fine is imposed on a man against his will?" the learned judge replied: "We will consider very well of this matter; it is time to have these actions redressed. It is hard that customs, by-laws, rights to impose fines, charters, and everything, should be left to a jury." By another report of the same case,[5] "Holt seemed inclined for the defendant. . . . And upon motion of the plaintiff's counsel, that it might stay till the next term, Holt, C. J., said that it should stay till doomsday with all his heart; but Rokesby, J., seemed to be of opinion that the action would lie. — *Et adjournatur*. Note. A day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house, and Holt repeated the said case to him, as a new attempt to extend the *Indebitatus Assumpsit*, which had been too much encouraged already, and Treby, C. J., seemed also to be of the same opinion with Holt." But Rokesby's opinion finally prevailed. The new action continued to be encouraged. Assumpsit was allowed upon a foreign judgment in 1705,[6] and the "metaphysical notion"[7] of a promise implied in law became fixed in our law.

[1] Barber Surgeons *v.* Pelson (1679), 2 Lev. 252. To the same effect, Mayor *v.* Hunt (1681), 2 Lev. 37, Assumpsit for weighage; Duppa *v.* Gerard (1688), 1 Show. 78, Assumpsit for fees of knighthood. [Tobacco Co. *v.* Loder, 16 Q. B. 765.]

[2] Shuttleworth *v.* Garrett, Comb. 151, 1 Show. 35, Carth. 90, 3 Mod. 240, 3 Lev. 261, s. c.

[3] [In Smith *v.* Airey 6 Mod. 125, 129, he said: "An *indebitatus* has been brought for a tenant right fine, which I could never digest." See also Anon. Farresly, 12.]

[4] 5 Mod. 444.

[5] 1 Ld. Ray. 502.

[6] Dupleix *v.* De Rover, 2 Vern. 540.

[7] Starke *v.* Cheeseman, 1 Ld. Ray. 538.

The equitable principle which lies at the foundation of the great bulk of quasi-contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. Indeed, one seeks in vain to-day in the treatises upon the Law of Contract for an adequate account of the nature, importance, and numerous applications of this principle.[1]

The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account. One who received money from another to be applied in a particular way was bound to give an account of his stewardship. If he fulfilled his commission, a plea to that effect would be a valid discharge. If he failed for any reason to apply the money in the mode directed, the auditors would find that the amount received was due to the plaintiff, who would have a judgment for its recovery. If, for example, the money was to be applied in payment of a debt erroneously supposed to be due from the plaintiff to the defendant, either because of a mutual mistake, or because of fraudulent representations of the defendant, the intended application of the money being impossible, the plaintiff would recover the money in Account.[2] Debt would also lie in such cases, since, at an early period, Debt became concurrent with Account, when the object of the action was to recover the precise amount received by the defendant.[3] By means of the fiction of a promise implied in law *Indebitatus Assumpsit* became concurrent with Debt, and thus was established the familiar action of Assumpsit for money had and received to recover money paid to the defendant by mistake. Bonnel *v.* Fowke[4] (1657) is, perhaps, the first action of the kind.[5]

[1] The readers of this Review will be interested to learn that this gap in our legal literature is about to be filled by Professor Keener's "Cases on the Law of Quasi-Contracts." [Professor Keener published his Cases in Quasi-Contracts in 1888, and followed it, 1893, with his admirable treatise on the same subject.]

[2] Hewer *v.* Bartholomew (1597), Cro. El. 614; Anon. (1696), Comb. 447; Cavendish *v.* Middleton, Cro. Car. 141, W. Jones, 196, s. c.

[3] Lincoln *v.* Topliff (1597), Cro. El. 644.

[4] 2 Sid. 4. To the same effect, Martin *v.* Sitwell (1690), 1 Show. 156, Holt, 25; Newdigate *v.* Dary (1692), 1 Ld. Ray. 742; Palmer *v.* Staveley (1700), 12 Mod. 510.

[5] [In Mead *v.* Death (1700), 1 Ld. Ray. 742. However, one who paid money under judgment was not allowed to recover it, although the

Although Assumpsit for money had and received was in its infancy merely a substitute for Account, it gradually outgrew the limits of that action. Thus, if one was induced by fraudulent representations to buy property, the purchase-money could not be recovered from the fraudulent vendor by the action of Account. For a time, also, *Indebitatus Assumpsit* would not lie in such a case. Lord Holt said in 1696: "But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus*."[1] His successors, however, allowed the action. Similarly, Account was not admissible for the recovery of money paid for a promise which the defendant refused to perform. Here, too, Debt and *Indebitatus Assumpsit* did not at once transcend the bounds of the parent action.[2] But in 1704 Lord Holt reluctantly declined to nonsuit a plaintiff who had in such a case declared in *Indebitatus Assumpsit*.[3] Again, Account could not be brought for money acquired by a tort, for example, by a disseisin and collection of rents or a conversion and sale of a chattel.[4] It was decided, accordingly, in Philips *v.* Thompson[5] (1675), that Assumpsit would not lie for the proceeds of a conversion. But in the following year the usurper of an office was charged in Assumpsit for the profits of the office, no objection being taken to the form of action.[6] Objection was made in a similar case in 1677, that there was no privity and no contract; but the Court, in disregard of all the precedents of Account, answered: "An *Indebitatus Assumpsit* will lie for rent received by one who pretends a title; for in such cases an Account will lie. Wherever the plaintiff may have an account an *indebitatus*

judgment was afterwards reversed. The rule to-day is, of course, otherwise. Keener, Quasi-Contracts, 417.]

[1] Anon., Comb. 447.

[2] Brig's Case (1623), Palm. 364; Dewbery *v.* Chapman (1695), Holt. 35; Anon. (1696), Comb. 447.

[3] Holmes *v.* Hall, 6 Mod. 161, Holt, 36, s. c. See, also, Dutch *v.* Warren (1720), I Stra. 406, 2 Burr. 1010, s. c.; Anon., 1 Stra. 407.

[4] Tottenham *v.* Bedingfield (1572), Dal. 99, 3 Leon. 24, Ow., 35, 83, s. c. Accordingly, an account of the profits of a tort cannot be obtained in equity to-day except as an incident to an injunction.

[5] 3 Lev. 191.

[6] Woodward *v.* Aston, 2 Mod. 95.

will lie." [1] These precedents were deemed conclusive in Howard *v.* Wood [2] (1678), but Lord Scroggs remarked: "If this were now an original case, we are agreed it would by no means lie." Assumpsit soon became concurrent with Trover, where the goods had been sold.[3] Finally, under the influence of Lord Mansfield, the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was "obliged by the ties of natural justice and equity to refund." [4]

But one is often bound by those same ties of justice and equity to pay for an unjust enrichment enjoyed at the expense of another, although no money has been received. The quasi-contractual liability to make restitution is the same in reason, whether, for example, one who has converted another's goods turns them into money or consumes them. Nor is any distinction drawn, in general, between the two cases. In both of them the claim for the amount of the unjust enrichment would be provable in the bankruptcy of the wrong-doer as an equitable debt,[5] and would survive against his representative.[6] Nevertheless, the value of the goods consumed was never recoverable in *Indebitatus Assumpsit*. There was a certain plausibility in the fiction by which money acquired as the fruit of misconduct was treated as money received to the use of the party wronged. But the difference between a sale and a tort was too radical to permit the use of Assumpsit for goods sold and delivered where the defendant had wrongfully consumed the plaintiff's chattels.[7]

The same difficulty was not felt in regard to the quasi-contractual claim for the value of services rendered. The averment, in the count in Assumpsit, of an indebtedness for

[1] Arris *v.* Stukely, 2 Mod. 260.
[2] 2 Show, 23, 2 Lev. 245, Freem. 473, 478, T. Jones, 126, s. c.
[3] Jacob *v.* Allen (1703), 1 Salk. 27; Lamine *v.* Dorell (1705), 2 Ld. Ray. 1216. Philips *v.* Thompson, *supra,* was overruled in Hitchins *v.* Campbell, 2 W. Bl. 827.
[4] Moses *v.* MacFerlan, 2 Burr. 1005, 1012.
[5] *Ex p.* Adams, 8 Ch. Div. 807, 819.
[6] Phillips *v.* Homfray, 24 Ch. Div. 439.
[7] [This statement is too sweeping. The authorities are divided on the question. Keener, Quasi-Contracts, 192-195.]

work and labor was proved, even though the work was done by the plaintiff or his servants under the compulsion of the defendant. Accordingly, a defendant, who enticed away the plaintiff's apprentice and employed him as a mariner, was charged in this form of action for the value of the apprentice's services.[1]

By similar reasoning, Assumpsit for use and occupation would be admissible for the benefit received from a wrongful occupation of the plaintiff's land. But this count, for special reasons connected with the nature of rent, was not allowed upon a quasi-contract.[2]

In Assumpsit for money paid the plaintiff must make out a payment at the defendant's request. This circumstance prevented for a long time the use of this count in the case of quasi-contracts. Towards the end of the last century, however, the difficulty was overcome by the convenient fiction that the law would imply a request whenever the plaintiff paid, under legal compulsion, what the defendant was legally compellable to pay.[3]

The main outlines of the history of Assumpsit have now been indicated. In its origin an action of tort, it was soon transformed into an action of contract, becoming afterwards a remedy where there was neither tort nor contract. Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise. Introduced as a special manifestation of the action on the case, it soon acquired the dignity of a distinct form of action, which superseded Debt, became concurrent with Account, with Case upon a bailment, a warranty, and bills of exchange, and competed with Equity in the case of the essentially equitable quasi-contracts growing out of the principle of unjust enrichment. Surely it would be hard to find a better illustration of the flexibility and power of self-development of the Common Law.

[1] Lightly *v.* Clouston, 1 Taunt. 112. See, also, Gray *v.* Hill, Ry. & M. 420.

[2] But see Mayor *v.* Sanders, 3 B. & Ad. 411.

[3] Turner *v.* Davies (1796), 2 Esp. 476; Cowell *v.* Edwards (1800), 2 B. & P. 268; Craythorne *v.* Swinburne (1807), 14 Ves. 160, 164; Exall *v.* Partridge (1799), 8 T. R. 308.

III. — ASSUMPSIT FOR USE AND OCCUPATION

In the foregoing pages it was stated that *Indebitatus Assumpsit* for use and occupation was not allowed upon a quasi-contract, for special reasons connected with the nature of rent. To set forth briefly these reasons is the object of this *excursus*.

It is instructive to compare a lease for years, reserving a rent, with a sale of goods. In both cases, debt was originally the exclusive action for the recovery of the amount due. In neither case was the duty to pay conceived of as arising from a contract in the modern sense of the term. Debt for goods sold was a grant. Debt for rent was a reservation. About the middle of the sixteenth century Assumpsit was allowed upon an express promise to pay a precedent debt for goods sold; and in 1602 it was decided by Slade's case that the buyer's words of agreement, which had before operated only as a grant, imported also a promise, so that the seller might, without more, sue in Debt or Assumpsit, at his option.[1]

Neither of these steps was taken by the courts in the case of rent. There is but one reported case of a successful *Indebitatus Assumpsit* for rent before the Statute 11 Geo. II. c. 19, § 14; and in that case the reporter adds: "Note, there was not any exception taken, that the *assumpsit* is to pay a sum for rent; which is a real and special duty, as strong as upon a specialty; and in such case this action lies not, without some other special cause of promise."[2] This note is confirmed by several cases in which the plaintiff failed upon such a count as well when there was a subsequent express promise[3] as where there was no such promise.[4]

The chief motive for making Assumpsit concurrent with Debt for goods sold was the desire to evade the defendant's

[1] *Supra*, p. 276.

[2] Slack *v.* Bowsal (B. R. 1623), Cro. Jac. 668.

[3] Green *v.* Harrington (C. B. 1619), 1 Roll. Ab. 8, pl. 5, Hob. 24, Hutt. 34, Brownl. 14, s. c.; Munday *v.* Baily (B. R. 1647), Al. 29, Anon. Sty. 53, s. c.; Ayre *v.* Sils (B. R. 1648), Sty. 131; Shuttleworth *v.* Garrett (B. R. 1688), Comb. 151, per Holt, C. J.

[4] Reade *v.* Johnson (C. B. 1591), Cro. El. 242, 1 Leon. 155, s. c.; Neck *v.* Gubb (B. R. 1617), 1 Vin. Ab. 271, pl. 1, 2; Brett *v.* Read (B. R. 1634), Cro. Car. 343, W. Jones, 329, s. c.

wager of law. This motive was wanting in the case of rent, for in Debt for rent wager of law was not permitted.[1] Again, although Assumpsit was the only remedy against the executor of a buyer or borrower, the executor of a lessee was chargeable in Debt. These two facts seem amply to explain the refusal of the courts to allow an *Indebitatus Assumpsit* for rent.

But although the landlord was not permitted to proceed upon an *Indebitatus Assumpsit*, he acquired, after a time, the right to sue in certain cases, in special Assumpsit, as well as in Debt. This innovation originated in the King's Bench, which, having no jurisdiction by original writ in cases of Debt, was naturally inclined to extend the scope of trespass on the case, of which Assumpsit was a branch. At first this court attempted to justify itself by construing certain agreements as not creating a rent. For example, in Symcock *v.* Payn,[2] the plaintiff declared that "in consideration that the plaintiff had let to the defendant certain land, the defendant promised to pay *pro firma prædicta terræ* at the year's end, £20." "All the court (*absente* Popham) held that the action was maintainable; for it is not a rent, but a sum in gross; for which he making a promise to pay it in consideration of the lease the action lies."[3] This judgment was reversed in the Exchequer Chamber in accordance with earlier and later cases in the Common Bench.[4]

In the reign of Charles I. the rule was established in the King's Bench that Assumpsit would lie concurrently with Debt, if, at the time of the lease, the lessee expressly promised to pay the rent. Acton *v.* Symonds[5] (1634) was the decisive case. The count was upon the defendant's promise to pay the rent in consideration that the plaintiff would demise a house to him for three years at a rent of £25 per annum. The court (except Croke, J.) agreed that if a lease

[1] Reade *v.* Johnson, 1 Leon. 155; London *v.* Wood, 12 Mod. 669, 681.
[2] Cro. El. 756, Winch. 15, s. c. cited (1621).
[3] See also Neck *v.* Gubb (1617), 1 Vin. Ab. 271, pl. 3; Dartnal *v.* Morgan (1620), Cro. Jac. 598.
[4] Clerk *v.* Palady (1598), Cro. El. 859; White *v.* Shorte (1614), 1 Roll. Ab. 7, pl. 4; Ablain's Case (1621), Winch, 15.
[5] W. Jones, 364, Cro. Car. 414, 1 Roll. Ab. 8, pl. 10, s. c.

for years be made rendering rent, an action on the case lies not upon the contract, as it would upon a personal contract for sale of a horse or other goods, but where there is an *assumpsit* in fact, besides the contract on the lease, an action on this *assumpsit* is maintainable. In the report in Rolle's Abridgment it is said: "The action lay, because it appeared that it was intended by the parties that a lease should be made and a rent reserved, and for better security of payment thereof that the lessor should have his remedy by action of debt upon the reservation, or action upon this collateral promise at his election, and this being the intent at the beginning, the making of the lease though real would not toll this collateral promise, as a man may covenant to accept a lease at a certain rent and to pay the rent according to the reservation, for they are two things, and so the promise of payment is a thing collateral to the reservation, which will continue though the lessee assign over." This doctrine was repeatedly recognized in the King's Bench;[1] it was adopted in the Exchequer in 1664;[2] and was finally admitted by the Common Bench in Johnson *v.* May[3] (1683), where "because this had been *vexata quæstio* the court took time to deliver their opinion, . . . and all four justices agreed that the action lay, for an express promise shall be intended, and not a bare promise in law arising upon the contract, which all agree will not lie."

In the cases thus far considered the *assumpsit* was for the payment of a sum certain. Assumpsit was also admissible where the amount to be recovered was uncertain; namely, where the defendant promised to pay a reasonable compensation for the use and occupation of land.[4] Indeed, in such a

[1] Potter *v.* Fletcher (1633), 1 Roll. Ab. 8, pl. 7; Rowncevall *v.* Lane (1633), 1 Roll. Ab. 8, pl. 8; Luther *v.* Malyn (1638), 1 Roll. Ab. 9, pl. 11; Note (1653), Sty. 400; Lance *v.* Blackman (1655), Sty. 463; How *v.* Norton (1666), 1 Sid. 279; 2 Keb. 8, 1 Lev. 279, s. c.; Chapman *v.* Southwick (1667), 1 Lev. 204, 1 Sid. 323, 2 Keb. 182, s. c.; Freeman *v.* Bowman (1667), 2 Keb. 291; Stroud *v.* Hopkins (1674), 3 Keb. 357. See also Falhers *v.* Corbret (1733), 2 Barnard. 386, but note the error of the reporter in calling the case an *Indebitatus Assumpsit.*

[2] Trever *v.* Roberts, Hard. 366.

[3] 3 Lev. 150.

[4] [King *v.* Stephens, 2 Roll. R. 435.]

case Assumpsit was the sole remedy, since Debt would not lie for a *quantum meruit*.[1]

Such was the state of the law when the Statute 11 Geo. II. c. 19, § 14, was passed, which reads as follows: "To obviate some difficulties that may at times occur in the recovery of rents, where demises are not by deed, it shall and may be lawful to and for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, and hereditaments held or occupied by the defendant in an action on the case for the use and occupation of what was so held and enjoyed; and if, in evidence on the trial of such action, any *parol* demise or agreement, not being by deed, whereon a certain rent was reserved, shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered."

The "difficulties" here referred to would seem to be two. If, before this statute, the plaintiff counted upon a *quantum meruit*, and the evidence disclosed a demise for a sum certain, he would be nonsuited for a variance. Secondly, if he declared for a sum certain, he must, as we have seen, prove an express promise at the time of the demise. The statute accomplished its purpose in both respects. But it is in the removal of the second of the difficulties mentioned that we find its chief significance. Thereby *Indebitatus Assumpsit* became concurrent with Debt upon all *parol* demises. In other words, the statute gave to the landlord, in 1738, what Slade's case gave to the seller of goods, the lender of money, or the employee, in 1602; namely, the right to sue in Assumpsit as well as in Debt, without proof of an independent express promise.

The other counts in *Indebitatus Assumpsit* being the creation of the courts, the judges found no great difficulty in gradually enlarging their scope, so as to include quasi-con-

[1] Mason *v.* Welland (1685), Skin. 238, 242, 3 Mod. 73, s. c.; How *v.* Norton (1666), 1 Lev. 179, 2 Keb. 8, 1 Sid. 279, s. c. It is probable that a promise implied in fact was sufficient to support an *assumpsit* upon a *quantum meruit*. "It was allowed that an *assumpsit* lies for the value of shops hired without an express promise," per Holt, C. J. (1701), 1 Com. Dig., *assumpsit*, C, pl. 6.

tracts, where the promise declared upon was a pure fiction. Thus, one who took another's money, by fraud or trespass, was liable upon a count for money had and received;[1] one who wrongfully compelled the plaintiff's servant to labor for him, was chargeable in Assumpsit for work and labor;[2] and one who converted the plaintiff's goods, must pay their value in an action for goods sold and delivered.[3]

But *Indebitatus Assumpsit* for rent being of statutory origin, the courts could not, without too palpable a usurpation, extend the count to cases not within the act of Parliament. The statute was plainly confined to cases where, by mutual agreement, the occupier of land was to pay either a defined or a reasonable compensation to the owner. Hence the impossibility of charging a trespasser in Assumpsit for use and occupation.

[1] *Supra*, 67; Thomas *v.* Whip, Bull. N. P. 130; Tryon *v.* Baker, 7 Lans. 511, 514.

[2] *Supra*, 68; Stockell *v.* Watkins, 2 Gill & J. 326.

[3] The writer is indebted to Professor Keener for a correction of the statement (*supra*, p. 297) that the count for goods sold and delivered was never allowed against a converter. See 2 Keener, Cases on Quasi-Contracts, 606, 607, n. 1; Cooley, Torts (2 ed.), 109, 110; Pomeroy, Remedies (2 ed.), §§ 568, 569.

60. THE HISTORY OF PAROL CONTRACTS PRIOR TO ASSUMPSIT [1]

By James Barr Ames [2]

IT is generally agreed by the Continental writers that in early German law, from which our law comes, only real and formal contracts were binding. The same is unquestionably true of the English common law from the time of Edward III. to the introduction of Assumpsit towards the end of the fifteenth century. But Mr. Justice Holmes in his Common Law, 260-264, and again in his essay on Early English Equity, 1 L. Q. Rev. 171-173, [3] endeavors to show that the rule requiring a *quid pro quo* for the validity of a parol undertaking was not of universal application in England, and that a surety, in particular, might bind himself without a specialty prior to the reign of Edward III. If this opinion is well-founded, an innovation and the abolition of the innovation must be accounted for. The evidence in favor of the validity during the two centuries following the Norman Conquest, of any parol obligation which was neither based upon a *quid pro quo*, nor assumed in a court of record, should, therefore, be very strong to carry conviction. The evidence thus far adduced has failed to convince the present writer.

Prior to the appearance of Assumpsit the contractual remedies in English law were Debt, Detinue, Account, and Covenant. Detinue and Account, every one will agree, were

[1] This Essay was first published in the Harvard Law Review, vol. VIII (1895), pp. 252-264. Additions made by the author in revising for this Collection are in brackets.

[2] A biographical note of this author is prefixed to Essay No. 43, in Volume II of this Collection.

[3] [Reprinted as Essay No. 41, in Volume II of this Collection. — Eds.]

based upon real contracts. Covenant lay only upon sealed instruments, that is, formal contracts. If, therefore, parol undertakings, other than real contracts, were ever recognized in early English law they must have been enforced by the action of Debt. But no instance of such an action in the royal courts, it is believed, can be found.

Glanvil, Bracton, and Britton all recognize the validity of debts founded upon a specialty.[1] Glanvil also says in one place that no proof is admissible in the king's court, if the plaintiff relies solely upon *fidei laesio;* and in another that the king's court does not enforce "privatas conventiones de rebus dandis vel accipiendis in vadium vel alias hujusmodi," unless made in that court, that is to say, unless they were contracts of record.[2] Bracton makes the statement that the king's court does not concern itself except occasionally *de gratia* with "stipulationes conventionales," which may be infinite in their variety.[3] The language of Fleta is most explicit against the validity of formless parol promises. "Oportet igitur ex hoc quod aliquis ex promissione teneatur ad solutionem, quod scriptura modum continens obligationis interveniat, nisi promissio illa in loco recordum habenti recognoscatur. Et non solum sufficiet scriptura, nisi sigilli munimine stipulantis roboretur cum testimonio fide dignorum." The same principle was expressed a few years later in a case in Y. B. 3 Ed. II. 78. The plaintiff counted in Debt on a grant for £200, showing a specialty as to £140,

[1] Glanvil, Lib. X. c. 12. "De debitis laicorum quae debentur . . . de cartis debita continentibus." Bracton, f. 100, b. "Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere." 1 Nich. Britton, 157, 162.

[2] Glanvil, Lib. X. c. 12, and c. 18.

[3] Bracton, f. 100, a. As there are several cases in Bracton's Note Book, in which the validity of covenants affecting land are assumed to be valid, Bracton, in the passage just referred to, probably had in mind miscellaneous covenants. See Pollock, Contracts (6 ed.), 136. It is certainly true that the rule that any promise under seal may give rise to an action was a comparatively late development in the history of covenant. As late as the middle of the fourteenth century, Sharshull, J., said in Y. B. 21 Ed. III. 7-20: "If he granted to you to be with you at your love-day, and afterwards would not come, perhaps you might have had a writ of covenant against him if you had a specialty to prove your claim."

and offering suit as to the rest. Frisk, for defendant, said: "Every grant and every demand by reason of grant must be by specialty, but of other contracts,[1] as of bailment or loan, one may demand by suit. Therefore as you demand this debt by reason of grant and show no specialty but of part, judgment," etc. The plaintiff was nonsuited. In Y. B. 2 Ed. III 4-5, Aldeburgh (Judge of C. B. four years later) said: "If one binds oneself to another in a debt in presence of people 'sans cause et sans especialtie,' never shall an action arise from this." The same doctrine is repeated in later cases in the fourteenth century.[2] In the light of these authorities it seems highly improbable that Debt was ever maintainable in the king's court, unless the plaintiff could show either a specialty or a *quid pro quo* received by the defendant.[3]

[1] The word contract was used in the time of the Year Books in a much narrower sense than that of to-day. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo*, e. g., a sale or loan. In other words, contract meant what we now mean by "real contract." What we now call the formal or specialty contract was anciently described as a grant, an obligation, a covenant, but not as a contract. See, in addition to the authorities cited in the text, Y. B. 17 Ed. III. 48-14. A count in debt demanding "part by obligation and part by contract." Y. B. 29 Ed. III. 25, 26, "Now you have founded wholly upon the grant, which cannot be maintained without a specialty, for it lies wholly in parol, and there is no mention of a preceding contract." Y. B. 41 Ed. III. 7-15. Thorp, C. J.: "You say truly if he put forward an obligation of the debt, but if you count upon a contract without obligation, as here (a loan), it is a good plea." Y. B. 43 Ed. III. 2-5. Debt on a judgment. *Belknap* objected "for there is no contract or covenant between them." 8 Rich. II. Bellewe (ed. 1869), 32, 111. "In debt upon contract the plaintiff shall shew in his count for what cause the defendant became his debtor. Otherwise in debt upon obligation." Y. B. 11 Hen. IV. 73, a-11; 8 Rich. II. Bellewe (ed. 1869), 32, 111; Y. B. 39 Hen. BI. 34-44; Sharington *v.* Strotton, Plowd. 298, 301, 302; Co. Lit. 292 *b*. The fanciful etymology given in Co. Lit. 47 *b* should be added: "In every contract there must be *quid pro quo*, for *contractus est quasi actus contra actum.*"

[2] Y. B. 11 & 12 Ed. III. 587; Y. B. 18 Ed. III. 13-7; Y. B. 44 Ed. III. 21, 23; [Y. B. 48 Ed. III. 29-15] Y. B. 9 Hen. V. 14, 23. The only statement in the Year Books to the contrary is the *dictum* of Candish, J., in 48 Ed. III. 6-11: "And also this action of covenant of necessity is maintainable because for so slight a thing one cannot always have his clerk to make a specialty." The case in Y. B. 7 Ed. II. 242 can hardly be said to throw any light upon the question under discussion.

[3] By the custom of London and Bristol, Debt was allowed upon a parol grant without *quid pro quo*. Y. B. 43 Ed. III. 11-1; Y. B. 14 Hen. IV. 26-13; Y. B. 22 Ed. IV. 2-6; F. M. *v.* R. C., 1 M. & G. 6 n. (a.); Y. B. 38 Hen. VI. 29-12; Y. B. 1 Hen. VII. 22-12; [Y. B. 1 Ed. IV 6-13; Dy. 370, pl. 58] Williams *v.* Gibbs, 5 A. & E. 208; Bruce *v.*

In the essay upon Early English Equity, already referred to, the distinguished writer makes the further suggestion that, although the formless parol undertakings ultimately failed of recognition in the King's Courts, the Church for a long time, with varying success, claimed a general jurisdiction in cases of *læsio fidei;* and that after the Church was finally cut down to marriages and wills, the clerical Chancellors asserted for a time in Chancery the power of enforcing parol agreements, for which the ordinary King's courts afforded no remedy. It is believed that undue importance has been attached to the proceedings in the spiritual court for *læsio fidei.* It is doubtless true that this court was eager to enlarge its jurisdiction, and to deal with cases of breach of faith not properly within its cognizance. We may also concede that the court was sometimes successful in keeping control of such cases when the defendant did not dispute the jurisdiction. But the authorities would seem to make it clear that from the time of the Constitutions of Clarendon, a prohibition would issue as a matter of course from the King's Court upon the application of one who was drawn into the spiritual court upon breach of faith in a purely temporal matter.[1]

Nor has the present writer been able to discover any traceable connection between the ecclesiastical claim of jurisdiction over *læsio fidei* and the jurisdiction of the Chancellor in the matter of parol agreements. If the Chancellor proceeded in the same spirit as the ecclesiastical judge, purely upon the ground of breach of faith, it would follow that in the absence of a remedy at common law, equity would give relief upon any and all agreements, even upon gratuitous parol promises. And Mr. Justice Holmes seems to have so interpreted the

Waite, 1 M. & G. 1, and cases cited in Pollock, Cont. (6 ed.), 138 n. (p.). See also the cases of parol undertakings in the Bishop of Ely's Court, 4 Seld. Socy. 114-118.

[1] Constitutions of Clarendon, c. 15, Stubbs, Sel. Chart. 134; Glanvil, Book X. c. 12; Abb. Pl. 31, col. 1, rot. 21 (1200); 2 Br. N. B. No. 50 (1219); Fitz. Abr. Prohib. 15 (1220); 2 Br. N. B. No. 1893 (1227); Stat. Circumspecte Agatis, 13 Ed. I.; Y. B. 22 Lib. Ass. 70; Y. B. 2 Hen. IV. 10-45; Y. B. 11 Hen. IV. 88-40; Y. B. 38 Hen. VI. 29-11; Y. B. 20 Ed. IV. 10-9; Y. B. 22 Ed. IV. 20-47; Y. B. 12 Hen. VII. 22. b-2; Dr. & St. Dial. II. c. 24.

following statement, which he cites from the Diversity of Courts (Chancery): "A man shall have remedy in Chancery for covenants made without specialty, if the party have sufficient witness to prove the covenants, and yet he is without remedy at the common law;" for he adds that the contrary was soon afterwards decided, citing Cary, 7: "Upon *nudum pactum* there ought to be no more help in Chancery than there is at the common law."[1] But, without all deference, the passage in the Diversity of Courts seems to have been misapprehended. There is really no contrariety between that passage and the extract from Cary. It is not asserted in the Diversity of Courts that one should have remedy for *all* parol covenants, where there was no remedy at common law. Full effect is given to the language used if it is taken to import that relief was given upon *some* parol covenants. So interpreted the Diversity of Courts accords with other authorities. For while it is confidently submitted that no instance can be found prior to the time of Lord Eldon[2] in which Equity gave relief upon a gratuitous parol promise, it is certainly true that Chancery did in some cases furnish a remedy upon parol covenants. But in all these Chancery cases it will be found that the promisee, acting in reliance upon the promise, had incurred expense, or otherwise parted with property, and that the Chancellor, upon an obvious principle of natural justice, compelled the promisor to make reparation for the loss caused by his breach of promise. Three such instances, between 1377 and 1468, are mentioned in an essay upon "The History of Assumpsit," in an earlier

[1] [In Anon. Litt. R., 3 Richardson said that Lord Ellesmere used to say that there were three things which he would never relieve in equity, 1 such leases aforesaid, 2 concealments, 3 nude promises. See also Alexander *v.* Crosh, Toth. 21.]

[2] At the present day a gratuitous undertaking by the owner of property to hold the same in trust for another is enforced in equity. It is a singular fact that this anomalous doctrine seems to have been first sanctioned by the conservative Lord Eldon, in *Ex parte* Pye, 18 Ves. 140. It was well settled that a use could not be created by a similar gratuitous parol declaration. Indeed, as late as 1855, Lord Cranworth, in Scales *v.* Maude, 6 D. M. & G. 43, 51, said that a mere declaration of trust by the owner of property in favor of a volunteer was inoperative. In Jones *v.* Lock, 1 Ch. Ap. 25, 28, he corrected this statement, yielding to the authority of what seemed to him unfortunate decisions.

[3] Essay No. 59, Volume III.

part of this Collection. Those instances might have been supplemented by three similar cases which were brought to light by Mr. S. R. Bird.[1] In Gardyner *v.* Keche (1452-1454), Margaret and Alice Gardyner promised to pay the defendant £22, who on his part was to take Alice to wife. The defendant, after receiving the £22, "meaning but craft and disceyt," married another woman, "to the great disceyt of the said suppliants, and ageyne all good reason and conscience." The defendant was compelled to answer the bill. In Leinster *v.* Narborough (circa 1480), the defendant being betrothed to the plaintiff's daughter-in-law, but desiring to go to Padua to study law, requested the plaintiff to maintain his *fiancée*, and a maid-servant to attend upon her during his absence, and promised to repay upon his return all costs and charges incurred by the plaintiff in that behalf. The defendant returning after ten years declined to fulfil his promise, and the plaintiff filed his bill for reimbursement, and was successful.[2] In James *v.* Morgan (1504-1515), the defendant promised the plaintiff 100 marks if he would marry his daughter Elizabeth. The plaintiff accordingly "resorted to the said Elizabeth to his great costs and charges," and "thorow the desavebull comforde" of the defendant and his daughter delivered to the latter jewels, ribbons, and many other small tokens. Elizabeth having married another man through the "crafty and false meane" of the defendant, the plaintiff by his bill sought to recover the value of his tokens, and also the "gret costs and charges thorow his manyfold journeys."

In all these cases there was, it is true, a breach of promise. But there seems to be no reason to suppose that the Chancellors, in giving relief, were influenced, even unconsciously, by any recollection of ecclesiastical traditions in regard to *læsio fidei*. It was so obviously just that one who had intentionally misled another to his detriment should make good the loss, that we need not go further afield for an explanation of the Chancellor's readiness to give a remedy upon such

[1] The Antiquary, Vol. IV. p. 185, reprinted in part in 3 Green Bag, 3.
[2] The Antiquary, Vol. V. p. 38.

parol agreements. In A little Treatise concerning Writs of Subpœna,[1] written shortly after 1523, — that is, at about the same time as the Diversity of Courts, — occurs the following instructive passage: —

"There is a maxim in the law that a rent, a common, annuity, and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be percepted of his lands in D, &c., and the buyer, thinking that the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and therefore inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion, without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna. But if he that made the sale of the rent had gone farther, and said that he, before a certain day, would make a sufficient grant of the rent, and after refused to do it, there an action upon the case should lie against him at the common law; but if he made no such promise at the making of the contract, then he that bought the rent hath no remedy but by subpœna, as it is said before."

Here the subpœna is allowed in the absence of a promise. There could, therefore, be no question of breach of faith. But the money having been paid and received under the expectation of both parties that the plaintiff would get a valid transfer of the rent, it was plainly just that equity should not permit the defendant to rely on the absence of a remedy at common law as a means of enriching himself at the expense of the plaintiff.

It is hardly necessary to remind the learned reader of the analogy between the case just considered, and uses arising upon a bargain and sale, which were supported for the first time only a few years before.[2] It was doubtless the same principle of preventing unjust enrichment which led the Chancellor in the reign of Henry V. to give a legal sanction

[1] Doct. & St. (18th ed.), Appendix, 17; Harg. L. Tr. 334.
[2] Y. B. 21 Hen. VII. 18-30.

to the duty of the feoffee to uses which before that time had been a purely honorary obligation.

To sum up, then, the Ecclesiastical Court had no jurisdiction over agreements relating to temporal matters. Chancery gave relief upon parol agreements only upon the ground of compelling reparation for what was regarded as a tort to the plaintiff, or upon the principle of preventing the unjust enrichment of the defendant; and the common law, prior to Assumpsit, recognized only those parol contracts which were based upon a *quid pro quo*.

The jurisdiction of Equity was rarely invoked upon breaches of promises after the development of Assumpsit, unless specific performance of the contract was desired. We have only to consider, therefore, the nature of the common-law real contracts which were enforced by the actions of Debt, Detinue, and Account.

It is not necessary to deal specially with Account, since the essential principles of that action have been clearly and fully set forth by Professor Langdell in the Harvard Law Review.[1] It will suffice to emphasize the fact that a defendant's duty to account, whether as bailiff or receiver, arose from his receipt of property as a trustee, and that a plaintiff entitled to an account was strictly a *cestui que trust*. In other words, trusts for the payment of money were enforced at common law long before Chancery gave effect to trusts of land. It need not surprise us, therefore, to find that upon the delivery of money by A to B to the use of C, or to be delivered to C, C might maintain an action of Account against B.[2] Account against a receiver was long ago superseded by the common count for money had and received by the defendant to the use of the plaintiff. But the words "to the use of" still bear witness to the trust relation.

Detinue was usually founded upon the contract of bail-

[1] Vol. II, pp. 242-257. See also Pollock, Cont. (6th ed.), 137, and the observations of the same writer in 6 Harv. Law Rev., 401, 402.

[2] (32 Ed. III.) Fitz. Ab. Acct. 108; (2 Rich. II.) Bellewe Acct. 7; Y. B. 41 Ed. III. 10-5; Y. B. 6 Hen. IV. 7-33; Y. B. 1 Hen. V. 11-21; Y. B. 36 Hen. VI. 9, 10-5; Y. B. 18 Ed. IV. 23-5; Y. B. 1 Ed. V. 2-2; Robsert *v.* Andrews, Cro. El. 82; Huntley *v.* Griffith, Gold. 159; Harrington *v.* Rotheram, Hob. 36, Brownl. 26 s. c.; Clark's Case, Godb. 210, pl. 299. See also Ames, Cases on Trust (2d ed.), 1 n. 3, 4 n. 1.

ment. This contract was a real contract by reason of the delivery of a chattel by the bailor to the bailee. The duty of the bailee was commonly to redeliver the same chattel to the bailor, either upon demand or at some time fixed by the terms of the bailment. But the chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain Detinue against the bailee.[1]

Detinue would also lie against a seller upon a bargain and sale. Here it was the payment of the purchase-money that as a rule constituted the *quid pro quo* for the seller's duty to suffer the buyer to take possession of the chattel sold. If the bargain was for the reciprocal exchange of chattels, the delivery of the chattel by the one party would be as effective a *quid pro quo* as payment of purchase-money to support an action of Detinue against the other party. It was hardly an extension of principle to treat the delivery of the buyer's sealed obligation for the amount of the purchase-money as equivalent to actual payment of money, or delivery of a chattel, and accordingly we find in Y. B. 21 Edward III. 12-2, the following statement by Thorpe (Chief Justice of the Common Bench in 30 Edward III.): "If I make you an obligation for £40 for certain merchandise bought of you, and you will not deliver the merchandise, I cannot justify the detainer of the money; but you shall recover by a writ of Debt against me, and I shall be put to my action against you for the thing bought by a writ of Detinue of chattels." But it was a radical departure from established traditions to permit a buyer to sue in Detinue when there was merely a parol bargain of sale without the delivery of a physical *res* of any sort to the seller. But this striking change had been accomplished by the time of Henry VI. The new doctrine may be even older,[2] but there seems to be no earlier expression of it in the books than the following statement by Fortescue,

[1] Y. B. 34 Ed. I. 239; Y. B. 12 & 13 Ed. III. 244; Y. B. 39 Ed. III. 17, A; Y. B. 3 Hen. VI. 43-20; Y. B. 9 Hen. VI. 38-13; Y. B. 9 Hen. VI. 60, A-8; Y. B. 18 Hen. VI. 9, A-7, and other authorities cited in Ames, Cases on Trusts (2d ed.), 52 n. 1.

[See Y. B. 44 Ed. III 27-6, called to the writer's attention by Mr. Crawford D. Hening.]

C. J.: "If I buy a horse of you, the property is straightway in me, and for this you shall have a writ of Debt for the money, and I shall have Detinue for the horse on this bargain." [1] From the mutuality of the obligations growing out of the parol bargain without more, one might be tempted to believe that the English law had developed the consensual contract more than a century before the earliest reported case of Assumpsit upon mutual promises.[2] But this would be a misconception. The right of the buyer to maintain Detinue, and the corresponding right of the seller to sue in Debt were not conceived of by the medieval lawyers as arising from mutual promises, but as resulting from reciprocal grants, — each party's grant of a right forming the *quid pro quo* for the corresponding duty of the other.[3]

It remains to consider the most prominent of all the English real contracts, the simple contract debt. The writ in Debt, like writs for the recovery of land, was a *praecipe quod reddat*. The judgment for the plaintiff is that he recover his debt. In other words, as in the case of real actions, the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender. This doubtless explains why the duty of a debtor was always for the payment of a

[1] Y. B. 20 Hen. VI. 35-4; Y. B. 21 Hen. VI. 55-12. See, to the same effect, Y. B. 37 Hen. VI. 8-18, per Prisot, C. J.; Y. B. 49 Hen. VI. 18-23, per Choke, J., and Brian; Y. B. 17 Ed. IV. 1-2. See also Blackburn, Contract of Sale, 190-196.

[2] Peck *v.* Redman (1555), Dy. 113, appears to be the earliest case of mutual promises.

[3] If the bargain was for the sale of land and there was no livery of seisin, the buyer had no common-law remedy for the recovery of the land, like that of Detinue for chattels. Equity, however, near the beginning of the sixteenth century, supplied the common-law defect by compelling the seller to hold the land to the use of the buyer, if the latter had either paid or agreed to pay the purchase-money. Br. Ab. Feoff. al Use, 54; Barker *v.* Keate, 1 Freem. 249, 2 Mod. 249 s. c.; [Nota, Brownl. 34.] Gilbert, Uses, 52; 2 Sand. Uses, 57. The consideration essential to give the buyer the use of land was, therefore, identical with the *quid pro quo* which enabled him to maintain Detinue for a chattel. Inasmuch as the consideration for parol uses was thus clearly borrowed from the common-law doctrine of *quid pro quo*, it seems in the highest degree improbable that the consideration for an *Assumpsit* was borrowed by the Common Law from Equity; 2 Harv. L. Rev. 18, 19 (Essay No. 59, *ante*). But see Salmond, Essays in Jurisprudence, 213 (Essay No. 61, *post*).

definite amount of money or a fixed quantity of chattels.[1] A promise to pay as much as certain goods or services were worth would never support a count in Debt.[2] In Y. B. 12 Edw. IV. 9-22, Brian, C. J., said: "If I bring cloth to a tailor to have a cloak made, if the price is not determined beforehand that I shall pay for the making, he shall not have an action of Debt against me."[3] For the same reason, the *quantum meruit* and *quantum valebant* counts seem never to have gained a footing among the common counts in Debt, and in Assumpsit the *quantum meruit* and *quantum valebant* counts were distinguished from the *indebitatus* counts. But principle afterwards yielded so far to convenience that it became the practice to declare in *Indebitatus Assumpsit* when no price had been fixed by the parties, the verdict of the jury being treated as equivalent to a determination of the parties at the time of bargain.

The ancient conception of a creditor's claim in Debt as analogous to a real right manifested itself in the rule that a plaintiff must prove at the trial the precise amount to be due which he demanded in his *præcipe quod reddat*. If he demanded a debt of £20 and proved a debt of £19, he failed as effectually as if he had declared in Detinue for the recovery of a horse and could prove only the detention of a cow.[4]

[1] A debtor might as easily owe chattels as money. A debt of chattels would arise from the same *quid pro quo* as a debt of money. A lessee might accordingly be charged in debt for chattels by the lessor. Y. B. 20 and 21 Ed. I. 139; Y. B. 50 Ed. III. 16-8. Y. B. 34 Hen. VI. 12-23; Anon. 3 Leon. 260; Denny *v.* Parnell, 1 Roll. Ab. 591, pl. 1. Or an employer by his employee. Y. B. 7 Ed. III. 12-2; Weaver *v.* Best, Winch. 75. Or a vendor by his vendee. Y. B. 34 Ed. I. 150; Y. B 27 Hen. VII. 8-20. [A case, temp. Ed. I. cited 5 C. B. 326 n. (a)]. As *Indebitatus Assumpsit* would lie for a debt payable in money, it was also an appropriate remedy for a debt payable in chattels. Cock *v.* Vivyan, 2 Barnard, 293, 384; Falmouth *v.* Penrose, 6 B. & C. 385; Mayor *v.* Clerk, 4 B. & Al. 268. The judgment in Debt for Chattels was like that in Detinue that the plaintiff recover his chattels. The essential distinction between Detinue and Debt for chattels seems to be this, — Detinue was the proper remedy for the recovery of a specific chattel, Debt, on the other hand, for the recovery of a specific amount of unascertained chattels.

[2] Johnson *v.* Morgan, Cro. El. 758.

[3] See to the same effect Y. B. 3 Hen. VI. 36-33; Anon., 2 Show. 183; Young *v.* Ashburnham, 3 Leon. 161; Mason *v.* Welland, Skin. 238, 242.

[4] Y. B. 3 Hen. VI. 4-4; Y. B. 11 Hen. VI. 5-9; Y. B. 21 Ed. IV. 22-2; Smith *v.* Vow, Moore, 298; Bagnall *v.* Sacheverell, Cro. El. 292; Blad-

For the same reasons Debt would not lie for money payable by instalments, until the time of payment of the last instalment had elapsed, the whole amount to be paid being regarded as an entire sum, or single thing.[1]

The *quid pro quo* which the debtor must receive to create his duty might consist of anything that the law could regard as a substantial benefit to him. Debts were usually founded upon a loan of money, a sale, a lease of property to the debtor, or upon work and labor performed for him. The *quid pro quo* in all these cases is obvious.[2] The execution of a release by an obligee to an obligor was also a sufficient *quid pro quo* to create a new debt between the same parties.[3] Forbearance to sue on a claim has been regarded in the same light: "for the forbearing of a suit is as beneficial in saving, as some other things would have been in gaining."[4]

But Debt will not lie upon mutual promises. In Smith *v.* Airey,[5] "Holt, C. J., said that winning money at play did not raise a debt, nor was debt ever brought for money won at play, and an *Indebitatus Assumpsit* would not lie for it; but the only ground of the action in such cases was the mutual promises. That though there were a promise, yet Debt would not lie upon that." According to another report of the same case Lord Holt said, "There is no way in the

well *v.* Stiglin, Dy. 219; Baylis *v.* Hughes, Cro. Car. 137; Calthrop *v.* Allen, Hetl. 119; Ramsden's Case, Clayt. 87; Hooper *v.* Shepard, 2 Stra. 1089; Hulme *v.* Sanders, 2 Lev. 4. In Vaux *v.* Mainwaring, Fort. 197, 1 Show. 215 s. c., the distinction was taken that in *Indebitatus Assumpsit* the plaintiff might recover the amount proved, but in Debt the amount stated in the writ or nothing. But afterwards the plaintiff was not held to a proof of the amount stated in the writ even in Debt. Aylett *v.* Lowe, 2 W. Bl. 1221; Walker *v.* Witter, Doug. 6; M'Quillin *v.* Cox, 1 H. Bl. 249; Lord *v.* Houston, 11 East, 62. See also Parker *v.* Bristol Co., 6 Ex. 706, per Pollock, C. B., and 1 Chitty, P. (7th Ed.) 127-128.

[1] Rudder *v.* Price, 1 H. Bl. 547. [Hunt's Case, Ow. 42, 2 Roll. Ab. 523.]

[2] If a bargain was for the sale of unascertained chattels, the transaction gave rise to mutual debts, the reciprocal grants of the right to a sum certain of money and a fixed amount of chattels forming the *quid pro quo* for the corresponding debts. Y. B. 21 Hen. VI. 55-12; Anon. Dy. 30, pl. 301; Slade's Case, 4 Rep. 94 b. See *supra*, p. 276.

[3] Y. B. 12 Hen. IV. 17-18.

[4] Bidwell *v.* Catton, Hob. 216.

[5] 2 Ld. Ray. 1034, 6 Mod. 128, Holt, 329 s. c.

world to recover money won at play but by special Assumpsit." [1]

Originally there was no *quid pro quo* to create a debt against a defendant if the benefit was conferred upon a third person, although at the defendant's request. Y. B. 9 Henry V. 14-23 is a case in point. The plaintiff, having a claim for £10 against T, released the claim upon the defendant's promise to pay him the same amount. The plaintiff failed because the benefit of the release was received by T.[2] In Y. B. 27 Henry VIII. 23, upon similar facts, Fitz-James, C. J., thought the plaintiff should recover in an action on the case upon the promise, but not in Debt, "for there is no contract,[3] nor has the defendant *quid pro quo*." Post, J., and Spelman, J., on the other hand, thought there was a *quid pro quo*. It was also made a question, on the same ground, whether a defendant who promised money to the plaintiff if he would marry the defendant's daughter was liable in Debt to the plaintiff who married the daughter.[4] But here, too, the opinion finally prevailed that though the girl got the husband, her father did receive a substantial benefit.[5] In Y. B. 37 Henry VI. 9-18, Moyle, J., said: "If I say to a Surgeon that if he will go to one J who is ill, and give him medicine and make him safe and sound, he shall have 100 shillings, now if the Surgeon gives J the medicines and makes

[1] Walker *v.* Walker, Holt, 328, 5 Mod. 13, Comb. 303 s. c. Per Holt, C. J., "This is merely a wager and no *Indebitatus Assumpsit* lies for it; for to make that lie, there must be a work done, or some meritorious action for which Debt lieth." Hard's case, 1 Salk. 23; Bovey *v.* Castleman, 1 Ld. Ray. 69. Per Curiam: "For mutual promises *Assumpsit* may lie, but not *Indebitatus Assumpsit*." These statements that Debt will not lie upon mutual promises bring out with great clearness the distinction already referred to between mutual promises and the mutual duties growing out of a parol bargain and sale. See Pollock, Contracts in Early English Law, 6 Harv. L. Rev. 398, 399.

[2] The true ground of this decision seems sometimes to have been misunderstood. Holmes, Common Law, 267.

[3] After Assumpsit came in, it was many years before it was called a contract. That term was still confined to transactions resting upon a *quid pro quo*. See Essay No. 59, *ante*, and Jenks, Doctrine of Consideration, 134.

[4] Y. B. 37 Hen. VI. 8-18; Y. B. 15 Ed. IV. 32-14; Y. B. 20 Ed. IV. 3-17. [See also Anon. 1 Vent. 268.]

[5] Applethwaite *v.* Northby, Cro. El. 29; Beresford *v.* Woodroff, 1 Rolle, R. 433.

him safe and sound, he shall have a good action [Debt] against me for the 100 shillings, and still the thing is to another and not to the defendant himself, and so he has not *quid pro quo*, but the same in effect." This reasoning of Moyle, J., met with general favor, and it became a settled rule that whatever would constitute a *quid pro quo*, if rendered to the defendant himself, would be none the less a *quid pro quo*, though furnished to a third person, provided that it was furnished at the defendant's request, and that the third person incurred no liability therefor to the plaintiff. Accordingly, a father was liable for physic provided for his daughter;[1] a mother for board furnished to her son;[2] a woman was charged in Debt by a tailor for embroidering a gown for her daughter's maid;[3] a defendant was liable for instruction given at his request to the children of a stranger, or for marrying a poor virgin.[4] The common count for money paid by the plaintiff to another at the defendant's request is another familiar illustration of the rule.

But it is an indispensable condition of the defendant's liability in Debt in cases where another person received the actual benefit, that this other person should not himself be liable to the plaintiff for the benefit received. For in that event the third person would be the debtor, and one *quid pro quo* cannot give rise to two distinct debts.[5] Accordingly where the plaintiff declared in Debt against A for money *lent* to B at A's request, his declaration was adjudged bad; for a loan to B necessarily implied that B was the debtor. If B was, in truth, the debtor, the plaintiff should have declared in Special Assumpsit against A on the collateral promise. If B was not the debtor, the count against A should have been for money *paid* to B at A's request.[6] By

[1] Stonehouse *v.* Bodvil, T. Ray. 67, 1 Keb. 439, s. c.
[2] Bret *v.* J. S., Cro. El. 756.
[3] Shandois *v.* Stinson, Cro. El. 880.
[4] Harris *v.* Finch, Al. 6.
[5] "There cannot be a double debt upon a single loan." *Per Curiam*, in Marriott *v.* Lister, 2 Wils. 141, 142.
[6] "If it had been an *Indebitatus Assumpsit* for so much money paid by the plaintiff at the request of the defendant unto his son, it might have been good, for then it would be the father's debt and not his son's; but when the money is lent to the son, 't is his

the same reasoning it would be improper to count against A for goods *sold* to B at A's request. If B was really the buyer, the seller should charge him in Debt, and A in Special Assumpsit on the collateral promise. If B was not the buyer, the count against A should be for goods *delivered* to B at A's request.[1] The same distinction holds good as to services rendered to B at A's request. If B is a debtor A is not, but only collaterally liable in Assumpsit.[2]

The distinction between Debt and Special Assumpsit, as illustrated in the cases mentioned in the preceding paragraph, is of practical value in determining whether a promise is in certain cases within the Statute of Frauds relating to guaranties. If B gets the enjoyment of the benefit furnished by the plaintiff at A's request, but A is the only party liable to the plaintiff, A's promise is not within the statute. If, on the other hand, B is liable to the plaintiff for the benefit received, that is, is a debtor, A's promise is clearly a guaranty and within the statute.[3]

There were obviously many parol agreements that did not come within the scope of Debt, Detinue, or Account. This difficulty was at length met by the action of *Assumpsit*, which became, indeed, a remedy upon all parol agreements.[4] But the distinction between Debt and Assumpsit is fundamental. For, while Assumpsit might always be brought where Debt would lie upon a simple contract, the converse

proper debt, and not the father's." Per Holt, C. J., in Butcher *v.* Andrews, Carth. 446 (Salk. 23; Comb. 473, s. c.). See also Marriott *v.* Lister, 2 Wils. 141.

[1] Y. B. 27 Hen. VIII. 25-3, per Fitz James, C. J.; Hinson *v.* Burridge, Moore, 701; Cogan *v.* Green, 1 Roll. Ab. 594; Anon., 1 Vent. 293; Stonehouse *v.* Bodvil, 1 Keb. 439; Hart *v.* Langfitt, 2 Ld. Ray. 841, 842, 7 Mod. 148 s. c.; Rozer *v.* Rozer, 2 Vent. 36, overruling Kent *v.* Derby, 1 Vent. 311, 3 Keb. 756, s. c.

[2] Alford *v.* Eglisfield, Dy. 230, pl. 56; Baxter *v.* Read, Dy. 272 n. (32); Nelson's Case, Cro. El. 880 (cited); Trevillian *v.* Sands, Cro. Car. 107, 193, 1 Roll. Ab. 594, pl. 14. A was the debtor and B was not liable in Woodhouse *v.* Bradford, 2 Rolle R. 76, Cro. Jac. 520 s. c.; Hart *v.* Langfitt, 2 Ld. Ray. 841, 7 Mod. 148 s. c.; Jordan *v.* Tompkins, 2 Ld. Ray. 982, 6 Mod. 77 s. c.; Gordon *v.* Martin, Fitzg. 302; Ambrose *v.* Roe, Skin. 217, 2 Show. 421 s. c.

[3] Watkins *v.* Perkins, 1 Ld. Ray. 224; Buckmyr *v.* Darnell, 2 Ld. Ray. 1085, 3 Salk. 15 s. c.; Jones *v.* Cooper, Cowp. 227; Matson *v.* Wharam, 2 T. R. 80.

[4] For an account of the development of Assumpsit see Essay No. 59, *ante*.

is not true. There were many cases where Assumpsit was the only remedy. *Assumpsit* would lie both where the plaintiff had incurred a detriment upon the faith of the defendant's promise, and where the defendant had received a benefit. Debt would lie only in the latter class of cases. In other words, Debt could be brought only upon a real contract, — Assumpsit upon any parol contract.

61. THE HISTORY OF CONTRACT[1]

By John William Salmond[2]

THE modern law of contract consists of a general theory, forming the bond of union between numerous, and otherwise unconnected, classes of contracts. This general theory is posterior in date to, and different in origin and history from, the particular contracts which it comprehends. Buying and borrowing, pledging and suretyship, cannot wait for the development of a refined system of law, and these processes must have been regulated by definite principles long before they were embraced in a comprehensive generalization. A complete history of contract must therefore consist of two parts. With the first of these, consisting in an enquiry into the origin and mode of development of the different species of contracts, we have not here to do. Our attention will be confined to the rise of the general principles that have given system and unity to the mass of detail.

The general theory of contract is almost entirely of domestic origin. In Bracton and Fleta indeed we find an attempt to employ the general principles of the Roman Law as a setting for English contracts,[3] but the chief significance of this

[1] This Essay was first published in the Law Quarterly Review, 1887, Vol. III, pp. 166-179.

[2] Parliamentary Counsel to the New Zealand Government, and head of the Law Drafting Office, since 1907.

M. A. 1882, New Zealand University, LL. B. 1887, London University; Professor of law in University of Adelaide; Professor of law in Victoria University College, Wellington, New Zealand, 1906.

Other Publications: Essays in Jurisprudence and Legal History, 1891; Jurisprudence, or The Theory of the Law, 1st ed. 1902, 2d ed. 1907; The Law of Torts, 1907; and other articles in the Law Quarterly Review, etc.

[3] Bracton, 99, 100; Fleta, ii. 56.

attempt lies in its failure. Perhaps in no other part of the law have Roman principles been so prominently introduced, only to be so completely rejected. The English law was thus left to fashion a theory of contract for itself. The manner in which it did so is an excellent illustration of the operation of modes of procedure in determining the development and form of the substantive law, for the history of the law of contract is almost entirely comprised in that of three forms of action. These are Debt, Covenant, and Assumpsit.

The first of these can be traced back to the beginnings of the law, but the earliest fact respecting it which need here be noticed is its division into the two actions of debt and detinue. Save for obscure hints in Bracton and Fleta,[1] there seems to be no reference to this division in the early legal writers, though it appears as well established in the Year Books of Edward I.[2] It was based, not, as is often said,[3] on the distinction between money and chattels, but apparently on that between obligation and property. Detinue was an action for the recovery of money or chattels of which the plaintiff had the ownership; debt for the recovery of money or chattels over which the plaintiff's right was merely *in personam*.[4] This division had important effects upon the law of contract, for it is evident that all bailments would be relegated to the action of detinue. Now this action played no part in the development of the theory of contract, and bailments consequently remained outside that theory until the rise of the action of assumpsit restored them to their rightful position as a class of contracts. Furthermore this removal of bailments rendered possible, as will be seen later, an important generalization within the action of debt. It is evident that debt, as the general remedy for all obligations that gave rise to liquidated claims, must have had a scope in some respects wider and in some narrower than the sphere of contract. Since, however, the cases in which it was the remedy for

[1] Bracton, 102 b; Fleta, ii. 60.
[2] Y. B. 20 & 21 Ed. I. 189.
[3] Holmes, Common Law, 252.
[4] Debt for chattels: — Y. B. 20 & 21 Ed. I. 139; Y. B. 3 Ed. II. 57; Y. B. 12 Ed. II. 354. Detinue for money: — Y. B. 6 Ed. II. 192; cf. Y. B. 33-35 Ed. I. 454.

causes of action not contractual were comparatively unimportant, they may be here neglected.

In every action of debt two elements were originally necessary, a *justa causa debendi* and a legal proof.[1] There were within historical times two principal modes of proof, the *carta* or written acknowledgment, and the *secta* or train of witnesses. It is to this fact that we owe the distinction between specialty debts and debts on simple contract. With respect to the *causae debendi* the most important fact to be noticed is that among them the early law did not include a promise or agreement. The idea of the obligatory nature of a mere executory agreement seems to have been unknown, and part performance was a condition precedent to the existence of an obligation.[2] Indeed it is doubtful whether an agreement was in any distinct manner recognised as an element of debt, or whether any conscious distinction was drawn between obligations *ex contractu* and any other form of obligation.[3] It was an accident of procedure that first introduced into the law the principle of enforcing mere promises. A written acknowledgment of a debt, or written promise to pay it, was obviously the best evidence that could be obtained, and by a transition very natural to early law it passed from the position of good evidence to that of conclusive proof. This appears from Bracton: 'Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere, sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniae non numeratae contra scripturam, quia scripsit se debere.'[4] The obvious effect of this rule of evidence upon the substantive law was that a written promise to pay ceased to be a mere proof of an already existing debt, and became a *causa debendi* itself. Thus was introduced into the English law a formal contract, and it would seem that to this same application of estoppel early law is largely indebted for this class of contract. Thus in

[1] Glanvil, x. 3; x. 12.
[2] Güterbock, Bracton (by Coxe), 138-139.
[3] Holmes, Common Law, 264. 'But the old debts were not conceived of as raised by a promise. They were a "duty" springing from the plaintiff's (? defendant's) receipt of property, a fact which could be seen and sworn to.'
[4] Bracton, 100 b.

the law of Rome the contract *literis* and the release by *acceptilatio* are undoubted instances of the process,[1] though to extend the same explanation to the stipulation might be overbold.

In debts proved by good suit, on the other hand, it remained necessary to allege an independent *causa debendi*. 'En dette sur contract le plaintiff monstra in son count pur quel cause le defendant devient son dettour. Autrement in dette sur obligation, car l'obligation est contract in luy meme.'[2] What then were these *causae*? To give a complete list of them is impracticable, but they were such transactions as sale, barter, loan (*mutuum*), and hiring of services. The common feature of them all was something given or done on one side in return for something to be given or done on the other. A generalization of the *causae debendi* was therefore possible, and this resulted in the well-known doctrine of *quid pro quo*. It was laid down that debt on a simple contract did not lie unless the defendant had received something in recompense for the obligation sought to be enforced against him.[3] The cause that led to this explicit statement of what had been implicit from the earliest times was probably the disturbing influence of the idea that simple contract debts were really based upon promises, and the consequent necessity of defining the limits within which a promise was obligatory. In the early theory of contract *quid pro quo*, as yet ungeneralized, was the principal; the promise, if recognised at all, merely the accessory. With the progress of legal theory, however, this relation became reversed, and *quid pro quo* assumed the aspect of a limitation upon the binding effect of promises.

The exact date of this generalization is uncertain. What seems the earliest mention of the term occurs in 39 Ed. III,[4] where however it is unconnected with contract. In 9 Hen.

[1] Hunter, Roman Law, 355 (1st ed.); Inst. Just. 3, 29, 1; Gaius, 3, 173. See Mr. Moyle's Excursus VIII. in his edition of the Institutes.
[2] Bellewe, 8 Rich. II. 111 (ed. 1869).
[3] There existed one exception to this rule, namely suretyship. The anomalous nature of this contract was soon perceived, and a sealed writing became necessary for its validity. Holmes, Common Law, 264.
[4] Y. B. 39 Ed. III. 18.

V [1] debt was brought by a plaintiff who had released a judgment debtor on the promise of the defendant to become debtor in his stead. It was held that this was not sufficient matter in law to charge the defendant. This is a good example of the kind of case that must have led to the formulation of the doctrine of *quid pro quo*, but the report makes no use of that expression. In 7 Hen. VI we find an objection made to the absence of *quid pro quo*, though not in an action of debt,[2] and thirty years later the rule is treated as perfectly familiar.[3] In 16 Ed. IV [4] it is remarked that 'parols sans reason' have no binding force. The principle in question has been somewhat hastily identified with the modern principle of consideration, but as we shall see it is very doubtful whether there is between them any historical connection whatever.

The second form of action to be considered is that of Covenant. By the time of Edward I this was fully established as a general contractual remedy by which damages could be obtained for the breach of any agreement under seal. It seems probable that this action passed into the law of contract from the law of real property, the earliest *conventiones* being leases of land for life or years.[5] However this may be, its history as a general contractual remedy can be traced with considerable clearness in the early writers. Glanvil tells us that *privatae conventiones* were not enforceable.[6] This assertion seems sometimes to be interpreted as meaning merely that contracts were invalid unless reduced to writing;[7] but Glanvil himself defines *privatae conventiones* as agreements made anywhere save in the King's Court. If not

[1] Y. B. 9 Hen. V. 14.

[2] Y. B. 7 Hen. VI. 1. This is an action of deceit on the case, but there is no doubt whatever that *quid pro quo* originated in debt, and an examination of the case will show that the objection in question is merely a verbal one.

[3] Y. B. 37 Hen. VI. 8.

[4] Y. B. 16 Ed. IV. 9.

[5] Digby's History of the Law of Real Property, 49 and 144.

[6] Glanvil, x. 8. 'Super hoc notandum est quod Curia domini regis hujusmodi privatas conventiones de rebus dandis vel accipiendis in vadium, vel alias hujusmodi, extra Curiam sive etiam in aliis Curiis quam in Curia domini regis factas, tueri non solet nec warrantizare; et ideo si non fuerint servatae Curia domini regis se inde non intromittet.'

[7] Güterbock, 138-139.

there made, no executory contract was enforceable whether reduced to writing or not. By the time of Bracton we find an advance in legal theory, for covenants are now enforced in the King's Court not of right but occasionally *de gratia.* 'Non solet aliquando necessitas imponi curiae domini regis de hujusmodi conventionibus privatis discutere. Sed tamen si quis a conventione recedat, succurritur alteri parti per actionem de conventione.'[1] Finally in Fleta the foregoing passage is transcribed with an omission of all reference to the remedy being of grace rather than of right.[2] Unlike debt and, as will be seen, unlike assumpsit, covenant was from the first recognised as a remedy for breach of promise. Unlike these actions therefore its origin imposed no limitation on its scope, and it threatened to become co-extensive with agreements. A limitation stringent enough however was imposed by the law of evidence. In 20 Ed. I[3] a plaintiff offered good suit to prove his covenant, and it was decided that a writing was the only admissible proof of an agreement. This rule determined the whole future history of the law of contract, for it obtained recognition at a time when a writing meant a writing under seal, and covenant was thus restricted to a class of agreements that became narrower every day.

The limitations thus sought to be imposed on the law of contract proved too strait to be borne. A form of action never fashioned for that end was soon pressed into the service for which debt and covenant had proved inadequate, and this in process of time developed into the third and most important contractual remedy. Of the origin and nature of Trespass on the Case it is needless here to speak, but a subject deserving some consideration is the process by which it became a remedy for breach of contract. It was intended as a provision for those cases of damage to person or property that did not fall within the original scope of trespass. Now inasmuch as breach of contract is a fruitful source of damage to person and property, it is evident that

[1] Bracton, 34. See also 100.
[2] Fleta, iii. 14, 3.
[3] 20 & 21 Ed. I. 222.

in many instances trespass on the case must have been in reality a contractual remedy. Very frequently therefore an undertaking or *assumpsit* formed part of the circumstances of the case, and appeared in the count.[1] This aspect of trespass on the case was early perceived, and the objection used at first to be brought that in such cases covenant was the appropriate and exclusive remedy. This, however, was overruled. Thus in 48 Ed. III, in an action against a surgeon for negligence, it is said: 'This action of covenant is of necessity maintainable without specialty, because for every little thing a man cannot have a clerk to make a deed.'[2] In a similar case in 11 Rich. II[3] the contract was made in London, and the negligent performance of it occurred in Middlesex. A dispute arising as to the venue, it was decided that issue might be joined either on the *assumpsit* or on the 'contrary medicines,' and that the venue would be determined accordingly. This shows a distinct appreciation of the double character of the action, trespass from one point of view, covenant from another.

Now happened an event closely analogous to what we have already noticed in the history of debt. In trespass on the case, as in debt, a promise was not originally the cause of liability, but merely an accessory; in both actions the promise came subsequently to be regarded as the principal; and in both a consequent necessity arose of limiting the new principle by a generalized statement of the old. In debt this resulted, as has been seen, in the doctrine of *quid pro quo*. In assumpsit it resulted first of all in the rule that the action lay for a breach of promise by malfeasance only, as distinguished from a breach by nonfeasance.[4] This rule was evidently a recognition that the action, though from one point of view contractual, was in reality delictual. If it resulted from a mere omission, damage to the plaintiff's person or property was not regarded as a cause of action; for, generally speaking, it is only through a con-

[1] 22 Ass. 94; Y. B. 43 Ed. III. 33.
[2] 48 Ed. III. 6.
[3] Bellewe, 5 and 332 (ed. 1869).
[4] Y. B. 2 Hen. IV. 3.

tractual obligation that a man becomes liable for passively permitting another's loss.

For a century the 'merveillous ley' that resulted from this distinction was subjected to a vigorous attack,[1] until at last in 20 Hen. VII the efforts of the assailants proved victorious. In this year it was decided, in defiance of all precedent, that an action on the case lay for a nonfeasance. 'If I covenant for money to build a house by such a day and do it not, an action on the case lies for the nonfeasance.'[2] This piece of judicial legislation obtained immediate recognition,[3] and from this time the law of contract may be regarded as established in what is practically its modern form.

It might be supposed that after this extension assumpsit would become coextensive with parol agreements. Not so however. There is no more curious feature in the history of the English law of contract than the manner in which limitations were invariably imposed upon the scope of contractual remedies and the obligatory nature of agreements. The limitation now imposed upon assumpsit was the necessary result of the fact that it was an action *ex delicto* perverted into a contractual remedy. A purely delictual action is based upon detriment suffered by the plaintiff, and that detriment is the measure of damages. A purely contractual action, on the other hand, is based on breach of promise, whether accompanied by detriment or not, and the measure of damages is the benefit that would have resulted to the plaintiff from performance. The employment of an action *ex delicto* as a remedy for breach of contract naturally resulted in a union of these two principles; the real, though not the ostensible, cause of action continued to be injury to the plaintiff, but the amount of this injury was immaterial, for the measure of damages was, as in a true contractual action, the benefit that would have resulted from performance.[4] This injury which, though an essential

[1] Y. B. 11 Hen. IV. 33; Y. B. 3 Hen. VI. 36; Y. B. 14 Hen. VI. 18; Y. B. 20 Hen. VI. 34; Y. B. 21 Hen. VI. 55.

[2] Y. B. 20 Hen. VII. 9.

[3] Y. B. 21 Hen. VII. 41.

[4] For example: Defendant spoils cloth sent to him by plaintiff to be

element, was neither the measure of damages nor the ostensible cause of action, operated as a limitation upon the action of assumpsit, and in a slightly modified form is still to be seen in the modern requirement of Consideration. It is true that valuable consideration is generally regarded as being of two kinds, only one of which consists in damage to the plaintiff. But even that form of consideration which consists in a benefit to the defendant ought logically and historically to be regarded as an injury to the plaintiff from whom it moves. And such is now the prevalent opinion. 'Detriment to the promisee is a universal test of the sufficiency of consideration' in assumpsit: Langdell, Summary, § 64.

The rule that assumpsit would not lie unless the plaintiff had suffered damage required and received distinct recognition on the extension of the action to nonfeasance. It was held that a breach of contract by nonfeasance, as a failure to build a house, was no ground of action unless loss had been incurred, as by prepayment of the price. In 21 Hen. VII, Chief Justice Frowike says, 'I shall have a good action on my case by cause of the payment of the money, and without payment of the money in this case there is no remedy; and yet if he builds the house and does it badly, an action on my case lies. . . . And so it seems to me that in the case at bar the payment of the money is the cause of the action on the case.'[1]

It has been already said that this requirement of injury to the plaintiff, which existed in assumpsit as a relic of the made into a coat. In a purely delictual remedy the damage done to the cloth is the ground of action, and the value of the cloth the measure of damages. If such a remedy is perverted into a contractual one, the ostensible ground of action is the failure to make a coat, and the measure of damages is the value of the coat; while the damage to the cloth remains as a limitation upon the scope of the action as a contractual remedy.

[1] Keilwey, 78. See also F. N. B., Covenant. Of course this rule has no connection with the requirement of *quid pro quo*, which was rigorously confined to the action of debt. In Y. B. 3 Hen. VI. 36, is reported an anomalous case, in which to assumpsit for a nonfeasance it was objected that no recompense had been assigned for the feasance. That no such requirement then existed is certain; for assumpsit did not lie for a nonfeasance in any case, and it lay for a malfeasance irrespective of reward. See Pollock, Princ. of Contr., 676.

original delictual character of the action, is represented with some modifications by the modern rule as to consideration. The cause and the significance of these modifications constitute the obscurest problem in the history of contract. The theory to be here advanced is that there is no historical connection between consideration and the original limitation of assumpsit, but that the former was an independent development in another part of the law, which by its strong analogy to the aforesaid limitation was enabled to introduce itself into assumpsit and to supplant the earlier principle. This process must have taken place between the end of the reign of Henry VII, when assumpsit was extended to nonfeasance, and the beginning of the reign of Elizabeth, in whose tenth year the later principle appears in an unmistakeable form.[1] There can be little doubt that the idea of consideration received its first applications from the Court of Chancery, where it formed an essential part of the equitable doctrine of uses. It is needless here to enter into the details of the varied and extensive use made of this principle by equity; it is sufficient to mention the necessity for good consideration in covenants to stand seised to uses, in conveyances without declaration of uses, and in the alienation of land subject to uses. The application of consideration to the law of uses has been brought into special prominence, partly by the importance of this branch of equitable jurisdiction, and partly by the operation of the Statute of Uses; but there is no sufficient reason for supposing that this was the only equitable application of the principle. There are some grounds for believing that consideration was originally in equity, as subsequently in law, a principle of contract. That there was an equitable jurisdiction in contract is undoubted. In 8 Ed. IV[2] the right to determine suits *pro fidei laesione* was distinctly claimed and exercised by the Chancellor. Fairfax, a judge of this reign, jealous of the growing jurisdiction, urged that the action on the case ought to be extended so as to obviate the

[1] Dyer, *272* a.
[2] Y. B. 8 Ed. IV. 4.

necessity of an appeal to Chancery.[1] From the *Diversité de courtes*[2] we learn that 'a man can have remedy in the Chancery for covenants made without specialty, if the party has sufficient proof of the covenants, since he is without remedy at the common law.' It was doubtless in order to check the growth of this jurisdiction that the judges extended the remedy of assumpsit, as already mentioned. Fineux, one of the authors of this change, remarks that since the party can have assumpsit for a nonfeasance, 'there will be no necessity for a subpœna.'[3] On the extension of the common law action, Chancery to a large extent abandoned its jurisdiction over contracts, though a relic of it is still to be seen in the remedy of specific performance.[4]

There is little or no direct evidence that consideration was applied by equity to contracts, for few examples of this branch of equitable jurisdiction are to be found. It appears from the early bills in Chancery that the term consideration, with its synonym cause, was in use in contracts as early as the reign of Edward IV;[5] but to what extent these words had a technical meaning, or bore reference to a definite legal principle, it is impossible to tell. In the absence of direct evidence we must fall back upon inference. Even within the law of uses we find consideration applied to contracts, for covenants to stand seised to uses (which might be by parol[6]) were limited by this requirement. That this was an isolated application of the principle to a single class of contracts seems a much less probable supposition than that it was merely a particular instance of a rule requiring a consideration in all contracts whatever. Furthermore the principle in question is applied by equity to contracts at the present day. As has been said, specific performance is a relic of the general equitable jurisdiction in contract. Now the application of this remedy is still limited by the requirement of consideration, a requirement

[1] Y. B. 21 Ed. IV. 23.
[2] Chauncerie.
[3] Y. B. 21 Hen. VII. 41.
[4] 1 Spence, Equit. Jur. 645; Bro. Ab., Action sur le case, 72.
[5] 1 Proceed. in Ch., Introd. 70 and 88, fol. ed.
[6] Spence, Equit. Jur. 478, note.

more imperative than in the common law, inasmuch as it disregards the distinction between specialty and parol agreements. For the application of this principle to contracts therefore, either equity must be indebted to the law, or the law to equity. Can the former supposition be maintained, when we know that to equity is due the origin of the principle, and its varied applications throughout the law of uses, trusts, and even in particular instances contract itself?

In treating of the history of this subject it is essential to bear in mind that consideration was not what is now known as valuable consideration. It was a much wider idea, and may be defined as any motive or inducement which could be regarded as rational and sufficient. It included four principal species: first, valuable consideration; second, natural affection; third, legal obligation; and fourth, moral obligation. This wide idea was destined to undergo a process of atrophy, the result of which has been that at the present day it is practically reduced to valuable consideration, though various relics of the original doctrine are still to be met with scattered through the law. The proofs of the original form of the idea, and of its more or less complete application in this form to assumpsit, are in the main the same, and may be given together: —

At the time when its legal use originated, the word was popularly used in the wide sense above indicated. Thus in *Doctor and Student:*[1] 'The said statute was well and lawfully made, and upon a good reasonable consideration.' In all probability the legal and popular uses were at first identical. Secondly, that natural affection originally formed part of the idea in question needs no proof, for even at the present day it receives nominal recognition under the title of good consideration.[2] What is perhaps the first mention of consideration in the Year Books is in 20 Hen. VII, where it is said of a grant: 'it was made on good consideration, for the elder brother is bound by the law of nature to

[1] l. 2, c. 55.

[2] This was originally the generic name, including valuable consideration as a species.

aid and comfort his younger brother.'[1] The relationship of good to valuable consideration can be satisfactorily explained only on the theory that they were originally species of a generic notion, which could not have been narrower than that above indicated. Thirdly, that consideration originally included legal obligation seems the only possible explanation of such actions as *indebitatus assumpsit*[2] and *insimul computassent*.[3] If the idea in question had been as narrow when these actions originated as it is now, there must have been an absurdity in alleging a debt as a consideration for a promise to pay it. Fourthly, that in certain cases moral obligation was regarded as a good consideration, may be gathered from anomalies that exist even at the present day. These and other exceptions to strict theory are commonly explained as relaxations that have been gradually permitted in the rule respecting consideration.[4] But it is extremely difficult to see how such exceptions could ever have been allowed entrance into the law. A far more satisfactory explanation is that these anomalies are the relics of a wider rule that included both the modern rule and the modern exceptions to it. Such an exception is to be seen in the doctrine that a past consideration is sufficient to sustain a promise if moved by a precedent request. The first statement of this rule is reported in 10 Elizabeth. Assumpsit was brought on a promise to indemnify the plaintiff, who had previously become bail for the defendant's servant. 'By opinion of the court it does not lie in this matter, because there is no consideration wherefore the defendant should be charged for the debt of his servant, ... for the master did never make request to the plaintiff to do so much for his servant, but he did it of his own head.'[5] The rule is evidently based on the idea that there is no moral obligation to recompense a benefit, and therefore no consideration for a promise to do so, unless the

[1] Y. B. 20 Hen. VII. 11.
[2] Bro. Ab., Action sur le case, 5 and 105; 4 Leonard, 2; 2 Bendloes, 84. But see a different view in Langdell, § 90.
[3] Moore, 708.
[4] Pollock, Contracts, 171.
[5] Dyer, 272 a.

benefit is conferred at the request of the person benefited.[1]

Of the method in which this principle obtained entrance into the action of assumpsit, there seems to be little or no evidence; but if we take into account the facts that it was probably applied to contracts by equity, that the development of assumpsit was determined by the desire to absorb the equitable jurisdiction in contract, that since the Statute of Uses consideration had spread widely through the common law, and that a strong resemblance existed between consideration and the common law limitation of assumpsit, it can scarcely be a matter of surprise that the latter was finally supplanted by the former.

Had the idea of consideration proved more stable, and made successful resistance to the process by which it has been reduced to its modern limits,[2] its introduction into assumpsit would have caused a profound modification of the law of contract. As it is, however, it may be said that even had this equitable principle never been borrowed by the common law, the law of contract would have been, except in one point, practically identical with what it now is. The exception lies in this, that whereas the original limitation of assumpsit consisted simply in detriment to the promisee, consideration consists in such detriment regarded as an inducement to the promise. The difference is important, for its effect was to render assumpsit inapplicable, save by reasoning approaching closely to the fictitious, to the very cases to which trespass on the case was first applied. *Coggs* v. *Bernard* is a typical example of this. Damage directly resulting from the breach of contract, as the loss of the brandy in this celebrated case, cannot of course be regarded

[1] For the same idea in the case of legal obligation, see Y. B. 29 Ed. III. 25.

[2] For instances see Bro. Ab., Feffements al uses, 54; *Sharrington* v. *Stratton*, Plowden, 301; 2 Leonard, 30; 1 Croke, 126; Dyer, 272 a, note; Moore, 643. Whether the equitable principle of consideration was at any period applied in its full extent to assumpsit may be doubted. That it was necessary in 30 Eliz. to decide that affection was no consideration to found an assumpsit, shows at once that the common law principle had been lost sight of, and that the equitable principle had been only partially substituted.

as an inducement to the promise; and therefore, although it would have fallen within the common law limitation of assumpsit, it is no consideration.

Assuming then that the law derived consideration from equity, the question remains: Whence did equity derive the principle? It is sometimes answered: From the civil law. If this means that it resulted from an adoption or adaptation of the Roman distinction between *contractus* and *nudum pactum*, the opinion is untenable. The *causæ civiles* which turned pacts into contracts were incapable of generalization, and even by omitting the formal contracts we obtain only the inadequate idea of valuable consideration. The civil law supplies however another application of the term *causa*, which is more to the point. Money paid or property delivered *sine causa* could be reclaimed; and a promise made *sine causa* was invalid.[1] This rule applied to contracts, whether formal or not. *Causa* was not of course restricted to valuable consideration, for this was never essential to a stipulation, but it included any adequate motive or sufficient reason. The rule rendered invalid promises made either under a mistake (*sine causa ab initio*) or for a valuable consideration which failed (*causa data causa non secuta*). Now the Canon Law expressly renounced the moribund distinction between *contractus* and *pactum*,[2] and this example was followed very generally throughout Europe.[3] This breakdown of the old theory would naturally call into prominence the requirement of *causa*, as being the only remaining limitation upon the binding efficacy of agreements; and that this was actually the case sufficiently appears from the following extract from Molina, a jurist of the sixteenth century. 'Observant etiam Felinus . . . et doctores communiter, ut jure canonico ex pacto nudo actio concedatur, qua paciscens cogatur implere pactum, necessariam esse causae expressionem: alioquin reus non cogetur solvere, nisi

[1] 'Est et haec species condictionis, si quis sine causa promiserit vel si solverit quis indebitum . . . Sed et si ob causam promisit, causa tamen secuta non est, dicendum est condictionem locum habere.' Digest, 12, 7, 1.

[2] Decr. Greg. i. 35, 1. Pacta quantumcunque nuda servanda sunt.

[3] Stair's Inst. i. 10, 7.

actor causam sufficienter probet. . . . Quo loco observa, sufficientem causam ut solvere cogatur esse titulum donationis.'[1] Molina proceeds to give examples of the rule, to identify it with the rule of the civil law already mentioned, and to call attention to the mistake made by some writers in confounding *causa* in this sense with the *causa* that was originally necessary as a *vestimentum pacti*. This same rule that a cause is necessary to sustain a promise is still recognised in its original form by the French law.[2] An enunciation of the same principle, very significant with regard to the English law, is to be found in *Doctor and Student*. The Student knows nothing of consideration, but expounds the law of contract exactly as it was understood during the reign of Henry VIII. But the Doctor of Divinity speaks as follows: 'And of other promises made to a man upon a certain consideration, if the promise be not against the law, as if A. promise to give B. 20*l*. because he hath made him such a house, or hath lent him such a thing, or such other like, I think him bound to keep his promise. But if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it, for it is to suppose that there was some error in the making of the promise. . . . And in all such promises it must be understood that he that made the promise intended to be bound by it, for else commonly after the doctors he is not bound, unless he were bound to it before his promise: as if a man promise to give his father a gowne that hath need of it to keep him from cold. And also such promises, if they shall bind, they must be honest, lawful, and possible, and else they are not to be holden in conscience though there be a cause. And if the promise be good and with a cause, though no worldly profit shall grow thereby to him that maketh the promise, but only a spiritual profit, as in the case before rehearsed of a promise made to an University, to a Citie, to the Church, or such other, and with a cause as to the honour of God, there is

[1] Molina, De Justitia, Disput. 257.
[2] Code Civ. 1131.

most commonly holden that an action upon these promises lieth in the Law Cannon.' [1]

That the principle so expounded by the doctor of divinity is identical with that which we have already found to exist in the Canon Law, there can be no doubt. Is it not almost equally obvious that it is also identical with the equitable principle of consideration? In name the two principles are the same, and in nature they are practically indistinguishable, save that consideration is not met with in equity until after the commencement of that process of contraction which finally reduced it to its modern limits. May we not conclude then that when the Chancellors, who till the reign of Henry VIII were almost invariably ecclesiastics, sought a basis on which to found their equitable jurisdiction in contract, they adopted a principle lying ready to their hands in a system of law with which they were familiar?

The theory that consideration is a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law, finds some support from Mr. Pollock in his work on Contracts,[2] but is rejected by Mr. Justice Holmes,[3] who attempts to prove the principle in question to be entirely an internal development of the English law of contract. The central point of Mr. Holmes's theory is that the modern rule of consideration is merely a modification of the ancient requirement of *quid pro quo* in the action of debt. But to this view the objections seem almost insurmountable. It is based on a mistaken view of the original contents of the idea of consideration. Between this idea, as first understood, and *quid pro quo*, there is a gap too wide to be bridged by any theory of development. Furthermore, *quid pro quo* was a principle confined to the action of debt, while consideration (as a theory of the law of contract) was found only in assumpsit. Thirdly, this latter principle was well known in the law of property some time before it appears in contracts; it seems scarcely probable

[1] Doctor and Student, ii. 24.
[2] Princ. of Contr., Appendix, Note F.
[3] The Common Law, 247-288; Early English Equity, Law Quart. Rev., No. 2, vol. i. p. 162 (Essay No. 41, Vol. I of this Collection).

therefore that it was derived from the action of debt. Again, it is alleged that the modification by which *quid pro quo* became consideration was the recognition of detriment to the promisee as well as benefit to the promisor. But in debt this extension was again and again attempted without success,[1] and it is not probable that it could have succeeded in assumpsit. Lastly, the two ideas in question lived on independently in their own spheres, and the clearest distinction was always drawn between them. Thus in 27 Hen. VIII it is said: 'I understand that one cannot have a writ of debt except when there is a contract; for the defendant has not *quid pro quo*, but the action is founded solely on the assumption, which sounds merely in covenant.'[2] Again in 27 & 28 Eliz.: 'In assumpsit it is not necessary that they contract at the same instant, but it suffices if there be inducement enough to the promise, and although it is precedent it is not material; otherwise in debt it is requisite that the benefit come to the party, otherwise for want of a *quid pro quo* debt does not lie.'[3] Again, as late as 4 Charles I: 'There is no contract between them nor hath he any *quid pro quo*, but he ought to have had an assumpsit.'[4] Could two principles have been kept so distinct, if one had been merely a modification of the other permitted by the laxity of the law?

To the later history of contract a mere allusion must suffice. Its chief feature was the temporary though prolonged disappearance of debt in favour of assumpsit in the case of simple contracts. For the purpose of avoiding the defendant's wager of law, early attempts were made to bring assumpsit where debt was the appropriate remedy. After a struggle between the Court of King's Bench and the Court of Exchequer Chamber,[5] it was finally decided in Slade's Case[6] that an action on the case would lie although

[1] Y. B. 37 Hen. VI. 8; Y. B. 20 Ed. IV. 3; 1 Croke, 880 (anomalous); 3 Croke, 193.
[2] Y. B. 27 Hen. VIII. 24.
[3] Dyer, 272 a, note.
[4] 3 Croke, 193.
[5] 2 Bendloes, 104; Moore, 433, 694, 703.
[6] 4 Co. Rep. 91.

debt was available. The only subsequent change that need be mentioned is the final recognition of a single limiting principle throughout the law of contracts by the merger of *quid pro quo* in valuable consideration.

62. HISTORY OF THE BENEFICIARY'S ACTION IN ASSUMPSIT[1]

By Crawford Dawes Hening[2]

"The true interest of the topic of Procedure is derived from the manner in which the tribunals have contrived from time to time to effect changes in the substance of the law itself, under cover of merely modifying the methods by which it is enforced." — Holland: "Elements of Jurisprudence," chap. xv. page 367 (1888).

MODERN English law, in a familiar line of decisions since the year 1724, has pronounced against the right of a third person, not a party to a contract, to maintain an action of assumpsit upon the contract, even though it was made for his benefit.[3]

Upon examination of these cases, the following questions are presented:

Is there any substantive right by which the beneficiary of a contract can enforce a part from the action of assumpsit?

Is the denial of the beneficiary's right in the cases of assumpsit due to a judicial denial of the existence of such a substantive right; or is the inability of the beneficiary to

[1] This Essay was first published in the American Law Register (now the University of Pennsylvania Law Review), Vol. XLIII, N. S. (LII, O. S.), pp. 764-779, Vol. XLIV, N. S. (LIII, O. S.), pp. 112-127 (1904-5); a continuation, in *id.* Vol. XLVII, O. S. (LVI, N. S.), pp. 73-87 (1908) is not here reprinted. Changes and additions have been made by the author for the present reprint.

[2] Professor of Law in the University of Pennsylvania. A. B. 1887, University of Pennsylvania, LL. B. 1903, Temple College.

Other Publications: Leading Cases on the Fourth Section of the Statute of Frauds, 1907; Life of Chief Justice Doe of New Hampshire (in Lewis' Great American Lawyers), 1908. Cases on the Simple Contract of Debt at the Common Law, 1907.

[3] *Crow* v. *Rogers*, 1 Strange, 592 (1724); *Price* v. *Easton*, 4 Barn. and Ad. 433 (1833); *Tweddle* v. *Atkinson*, 1 B. and S. 393 (1861); *Empress Engineering Co.*, 16 Chancery Div. 125, 129 (1880), *Re Rotherham Alum and Chemical Co.*, 25 Ch. Div. at page 111 (1883); *Cleaver* v. *Mutual Reserve Fund Life Association*, 1 Q. B. 147 (1892).

recover due in reality to certain technicalities of procedure or principles of substantive law incident and peculiar to the action of assumpsit itself?

If, apart from assumpsit, there is such a substantial right of a beneficiary, what is its basis, its scope, and its limitations, and in what formal procedure or actions is it enforceable? At the present day, "Whatever disadvantages the English law on the question may have, it has at least the merit of definiteness. A beneficiary has no legal rights."[1] That the modern English judicial conscience finds satisfaction in this conclusion may be seen from the exclamation of Crompton, J.: "It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued."[2] But why "*monstrous*," if conformable to the contractors' intent?

That the modern English courts in preventing this monstrosity believe they have not sacrificed any cherished English judicial principle appears from the repeated assurances of the modern English judges that the beneficiary cannot recover because he is "a stranger to the consideration," and because "he is not a party to the contract."[3]

Unfortunately, for judicial uniformity, the monstrosity of the proposition that a person may be entitled to sue on a contract without being himself liable to suit thereon, never shocked any judicial conscience in England until 1861.

It can be shown (conclusively, I submit), that outside of assumpsit this so-called "monstrosity" has been the law of England for five hundred years.

The line of approach in investigating the common law on this subject, lies in challenging and demanding proof for the propositions so often asserted, that:

(1) No one can recover on a contract except the person who furnishes the consideration.

(2) No one can recover on a contract except the promisee.

[1] "Contracts for the Benefit of a Third Person," by Samuel Williston, xv Harvard Law Review, 774, (1902).

[2] *Tweddle* v. *Atkinson*, 1 Best and Smith, 393 (1861).

[3] *Price* v. *Easton*, 4 Barn. and Ad. 433 (1833); *Thomas* v. *Thomas*, 2 Ad. & El. (N. S.) 851, 859 (1842).

We find both these propositions asserted in the English decisions in the action of assumpsit. That the foregoing two propositions are invariably discussed solely from the stand-point of the action of assumpsit is apparent from any study of the opinions of the leading text-writers.

There is, however, no consensus of opinion among text-writers with respect to the truth of both propositions.[1] And

[1] Judge Hare in his work on contracts, p. 146, says "that the only person entitled to sue on a contract is he who furnishes the consideration." He says:

"It is a well-established rule of the common law that the right of action lay not with him to whom the promise was made and who would have been benefited if it had been kept, but with the party from whom the consideration moved on the faith of the promise (citing Patteson, J., in *Thomas* v. *Thomas*). . . . The rule may be traced in the reports from the origin of the action of assumpsit down to our own times, although it is not infrequently modified or superseded by principles which the common law has derived from equity (citing *Bourne* v. *Mason*, 1 Ventris, 6)."

Of course such a rule effectually bars any action by a third party brought to enforce a contract made for his benefit. The reluctance of this learned writer to admit that this test should be applied indiscriminately to all actions of the beneficiary appears in his concession on page 194, that "The question when a delivery to one man for the use of another will confer a right on the latter is, nevertheless, one of the most difficult and doubtful known to the law."

Professor Langdell contends that no person can enforce a contract except the promisee. He says: (Summary of the Law of Contract, sec. 62):

"A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise. In the case of a promise made to one person for the benefit of another, there is no doubt that the promisee can maintain an action, not only in his own name but for his own benefit. If, therefore, the person for whose benefit the promise was made could also sue on it, the consequence would be that the promisor would be liable to two actions. In truth, a binding promise to A to pay $100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment."

But compare Professor Langdell's statement, (ii Harvard Law Review, page 249):

"If money be delivered by A to B in order that it may be delivered by B to C, or if it be delivered by A to B to the use of C, it has often been held that B will be accountable to C."

Such a rule as that laid down by Professor Langdell in his "Summary of the Law of Contract" (*supra*), if true, obviously defeats the right of action of the beneficiary where he is not the promisee. But equally obviously the two theories (the one Judge Hare's and the other Professor Langdell's), cannot both be correct. If the only requisite of a right to enforce a contract is to have furnished the consideration, then a person may enforce a contract even if he is not the promisee. In fact, we find Judge Hare asserts the following proposition — the exact contradictory of Professor Langdell's — as one of the arguments

there is hardly any unanimity of judicial opinion among common law judges to-day upon any point involved in the subject of the beneficiary.[1]

That various courts of common-law origin, professedly expounding and administering that law, should reach not only contrary conclusions on this problem, but conclusions involving fundamentally antagonistic conceptions of the doctrine of Contract and of Consideration, provokes the inquiry whether the common law on the subject of the right of action of a stranger to the contract has ever been fully investigated, ascertained and presented.

So far as the question is a legal and not an equitable question, nearly all text-writers of the present day on contracts, attempt to solve the problem of the beneficiary's right

for the contention that the furnishing of the consideration is the sole test of the right of action: "If A promised to pay B 1,000 pounds if C would go to Rome, and C took the journey, he and not B is regarded as entitled to the reward, and to compel the payment of it by suit." (Hare on Contracts, page 147). Leake interprets the doctrine of consideration to mean that although the consideration need not be furnished directly by the promisee, yet if furnished by a third party it must have been furnished at the promisee's request. (Leake on Contracts, page 430).

Professor Williston admits that "The rule that consideration must move from the promisee is somewhat technical, and in a developed system of contract law there seems no good reason why A should not be able for a consideration received from B to make an effective promise to C." ("Contracts for the Benefit of a Third Person," by Samuel Williston, xv Harvard Law Review, page 771 (1902)).

Professor Williston, however, denies the right of action of the beneficiary on the other ground — "The beneficiary is not a party to the contract, and, apart from some special principle governing this class of cases, cannot maintain an action." (Ib. page 773 (1902)).

[1] The Supreme Court of the United States has said that "The right of a party to maintain assumpsit on a promise not under seal made to another for his benefit, although much controverted, is now the prevailing rule in this country." (*Hendrick* v. *Lindsay*, 93 U. S. 143, 1876).

The vagueness of this statement is apparent.

Some American States by their judicial interpretation of the common law have declared the right to exist under certain conditions and restrictions. (Contracts for the Benefit of a Third Person by Samuel Williston, xv, Harvard Law Review, page 778 (1902)). But in these states the right of action is granted to the beneficiary, in language that is unmistakedly apologetic, recognizing the supposedly correct English principle and limiting the American exceptions to certain circumstances supposed to be peculiar. Of this so-called American rule it has been truly said by Sir Frederick Pollock that "there does not seem to be any general agreement as to its reason or its precise extent." (Contracts (7th Ed.) page 215.)

Other American States are content to follow English precedents of the nineteenth century.

of action by the aid of or in conformity to the doctrine of consideration in special assumpsit, i. e., as a question of the law and procedure in special assumpsit. In reality, the question is one of the general substantive contract law of England and of the States inheriting that law. In point of fact, all the decisions usually cited on the right of action of the beneficiary are decisions in actions of special assumpsit and, hence, these decisions turn on the doctrine of consideration, and are controlled and limited by the judicial interpretations of that doctrine.

The citations of these *assumpsit* decisions therefore, proves nothing beyond the action of assumpsit; and because by the very nature of such actions they rest on the doctrine of consideration (which invariably requires that no one who has not furnished the consideration, or, at least, that no one who is not the promisee, shall have the right to maintain assumpsit), these decisions are convincing to only those who regard contract and assumpsit as identical concepts.

The real question is, however, a much broader one. Is there any substantive right of action conferred by the common law of England on the beneficiary of a contract independent of assumpsit and therefore independent of the doctrine of consideration, i. e., independent of his having furnished the consideration and of his being the promisee? "An English misunderstanding or perversion of the common law is not necessarily our law."

The doctrine of consideration was, of course, unheard of in England until the reigns of Henry VII, Henry VIII and Elizabeth, when it came into vogue gradually, in the extension of the action on the case to promises previously unenforceable. "The name 'consideration' appears only about the beginning of the sixteenth century, and we do not know by what steps it became a settled term of art." [1] Outside of

[1] Pollock on Contracts (7th ed.), page 170.

Professor Ames states that the earliest case of bilateral assumpsit he has found is *Pecke* v. *Redman*, 1 Dyer, 113 a (1555).

Unilateral assumpsits, i. e., based on actual detriment incurred on request were of course, earlier to appear. Anno 21 H. vii i Keilw. 77, 78.

But these cases suffice to show that the doctrine of consideration belongs to a wholly different species of the genus Contracts than the species to which we may apply the terms Accountability and debt.

the action on the case and its derivative special assumpsit, it is familiar law that the doctrine of consideration was never recognized and had never been heard of or applied.

But the right of action of the beneficiary was an established right long before the doctrine of consideration existed. The right of action of the beneficiary was previously recognized and firmly established in the ancient actions of account and of debt, years before the rise of the action of Case on "Promises." The doctrine that neither Case nor assumpsit would lie except for a consideration, and finally the definition of consideration as consisting in a detriment suffered by the plaintiff who must be the promisee, had obviously no place in the action of debt where "there was no theory of consideration, and therefore, of course, no limit to either the action or the contract based upon the nature of the consideration received."[1] No more was there any conception of "Consideration" (as we now have come to accept the term) in the action of Account.

The relation of consideration in special assumpsit to the rights of third parties will be discussed later. We shall first deal with account and debt, where consideration was of course, unknown, and examine the cases giving the beneficiary a right to sue in those actions.

I. THE ACTIONS OF ACCOUNT AND OF DEBT, AND THE RIGHT OF ACTION OF THE BENEFICIARY IN EACH

Before discussing the principles governing the beneficiary's right of action in Account, let us examine the facts in a number of cases where the right was recognized.

In the fourteenth century the writ of account was in common use wherever the plaintiff had constituted the defendant either his customary bailiff or his bailiff *pro hac vice*, to sell goods, or his receiver to take money from third persons.

This use of the writ of account is at least six hundred years old.[2] The plaintiff counted upon the fact that he had

[1] Holmes' Common Law, page 271.

[2] Selden Society Year Books Series, vol. II, p. 34. Reprinting Y. B. 2 Ed. II, 1308-9, 118 Anon. *Ryvere* v. *Frere*, Ib. Vol. III, p. 126, (3 Ed. II). Y. B. 44 Ed. III, F. 1 Pl. 2, (Hil.). Pollock and Maitland's

bailed merchandise to the defendant to sell, that the defendant had sold the goods and had received divers sums of money at the hands of divers mentioned persons, and a count was useless if it failed to mention definitely by whose hands the defendant received the monies, unless he was the plaintiff's duly constituted bailiff.[1]

From this use of the writ of account by the lord or master against the steward or servant[2] is to be traced its use by the beneficiary.

The customary bailiff's receipt of the property and monies were received under a prior authority from the lord to act as bailiff or to receive. Suppose, however, a stranger without previous authority from the lord received his rents from the hands of his tenants, they directing payment to be made to their lord? The common law at length impressed upon this transaction the fiction of the lord and bailiff and held

History of English Law, Vol. II, p. 219, mentions the earliest known action of account to be of the year 1232.

Bracton's Note Book, pl. 859.

In Maitland, "Register of Original Writs," iii Harvard Law Review, 173, will be found a reference to the writ of Account, giving that technical language which adhered to the writ to the latest day: "Account: *justificies talem quod . . . reddat tali racionabilem compotum suum de tempore quo fuit ballivus suus*," etc.

An illustration of an old manorial account will be found in the "Yearly Account of Manor of Cuxam," A. D. 1316-1317, reprinted in "English Manorial Documents, edited by Edward P. Cheyney, A. M., published by the Department of History of the University of Pennsylvania."

[1] Y. B. xliii Ed. III F. 21 Pl. 11.

Y. B. xlvi E. III. fol. 3 pl. 6; (Fitz. Accompt. 38).

Y. B. xlvi E. III. fol. 9 pl. 4; (Fitz. Accompt. 39).

[2] In 1267 the statute of Marlbridge (52 Hen. III. c. 23) gave the lord a writ of attachment against the body of his bailiff who had no lands or tenements whereby he could be distrained. The statute of Westminster II (13 Ed. I. c. 11) provided that the lord or master could assign auditors before whom the steward, bailiff or servant must account.

"These statutes sanctioned a procedure against accountants which was in that age a procedure of exceptional rigor. We gather that the accountants in question were for the most part 'bailiffs' in the somewhat narrow sense that this word commonly bore, manorial bailiffs. In Edward I's day the action was being used in a few other cases; it had been given by statute against the guardian in socage and we find it can be used among traders who have joined in a commercial adventure; the trade of the Italian bankers was being carried on by large 'societies' and Englishmen were beginning to learn a little about partnership. Throughout the fourteenth and fifteenth centuries the action was frequent enough, as the Year Books and Abridgments show." — Pollock and Maitland's History of English Law, Vol. ii. p. 219 (1895).

the bailee accountable to the beneficiary. In 1368 (41 Ed. III) in an action of account involving another point, and the issue being whether account or debt would lie, Cavendish [1] (then Sergeant) argued: "If I bail certain moneys to you to bail to John, he shall have writ of account because the property is in him immediately when you receive them by my hand, and he cannot have account by writ of debt." [2] This assertion of Cavendish was unchallenged and he speaks of John's right to an account as familiar law.

But this same year that first of the abridgers of the Common law, Nicholas Statham (or perhaps we should say, Baron Statham) [3] queried, "Whether he to whom the bailment ought to have been made shall have action of account." [4]

In Michaelmas 1374, Y. B., 47 Ed. III, Fol. 16, pl. 25, such an action was brought and the defendant pleaded that the person at whose hands the alleged receipt was had, was a co-monk with the plaintiff, the Abbot of Wanerle, but was not named as co-monk. This defence was allowed to be made, and this judgment points to the conclusion that the action of account was then clearly maintainable, unless there was a plea filed good in law to bar this action of account, but that otherwise, this declaration was good. [5]

Flowing from out this marshland the stream almost immediately appears, running clear, distinct, in a fixed course between well defined banks. As the following decision of

[1] See Foss's Lives, p. 159, John de Cavendish.

[2] Y. B. 41 E. III. Fol. 10. pl. 5 (1368).

[3] "Statham, Nicholas, was elected reader of Lincoln's Inn in Lent 1471, II Edward IV. (Dugdale's Orig. 249) and received on October 30, 1467, a patent for the grant of the office of second baron of the Exchequer. As Statham's name is never mentioned afterwards, it is uncertain whether he ever filled the office.

"Although he never once is mentioned in the Year Books, an abridgment of the cases reported in them to the end of the reign of Henry VI., being the first attempt at a work of that nature, goes under his name." — Foss' Lives of the Justices, p. 630.

[4] Statham Abr. Acc. 5, in abridging the case Y. B. 41 Ed. III. fol. 31, pl. 37. But Statham nowhere under the title Account cites the Y. B. 2 R. II (above next mentioned in the text) owing doubtless to the fact that he had no access to the Ms. from which Fitzherbert quoted.

[5] "The Abbot of Wanerle brings writ of Account against a man as receiver of his monies, and counts how he was his receiver by the hands of such an one."

1379 is the earliest now accessible to the writer and probably one of the earliest that can be found, the full report of it by Fitzherbert[1] is reprinted. In the Common Pleas:

"Account against one *J. D.* and counts that he received of him ten marks to bargain by the hand of one Rauffe Barnerde to profit and merchandize.

"*Clopton.* We say that for certain business which the town of B. had to transact with the plaintiff, the people of the town sent to us ten marks by the said R. B. by whose hands, &c., to carry to him who is now plaintiff, whereupon we come to him who is now plaintiff and to carry the money to him as messenger and you see here is the money taken, *absque hoc* that we were his receiver of this money in another manner. Judgment if we ought to account, &c.

"*Hols.* And we (ask) judgment, &c., since you have admitted the receipt and we pray for an account and damages for the detention, &c.

"*Bel.*[2] It is positive law that a man shall not have damages in a writ of account, and of the balance he has admitted by his reply that he was only a messenger wherefore he was not accountable by the law in respect of any profit of this in so much as he has made tender of the money and still by the law he cannot have any other action except by writ of account to recover the money because the receipt was not for the purpose of merchandizing but as messenger he received the money; but if the receipt had been to profit and merchandize, the plaintiff would stand as well for the loss as for the gain. Wherefore I put this case that my bailiff of my manor receives my rents of my lands and retains the money in his hands for two or three years, I shall have no other remedy except by writ of account and in this suit I shall have nothing except the money which he received, and he shall account for no profit coming from it during the same time because he has no authority to put out the money in merchandizing either to gain or to lose wherefore will you have the money or not?

[1] Easter Term, 2 Rich. 2, Reported in Fitzherbert's Abridgment, Title Accompt. pl. 45.

[2] Robert de Bealknap, Chief Justice of the Common Pleas, 1374–1387.

"*Persey.*[1] If I am receiver of your monies &c. to merchandize with and I retain them in my hand without putting them to merchandize so that I do not lose or gain anything shall I not be obliged to account for the profits of them?

"*Belk.* Yes, certainly you can show on the account that you could have put thè monies to merchandize and profit for us and if you cannot be excused in respect of it by oath or in some other way, you will be charged with reasonable profit &c. *quod.*

"*Skipwith.*[2] That is agreed because he received the money to put them to merchandize but not so here because he never had authority to put them out of his hand.

"*Belk.* If I am debtor to Sir Henry Persey in 20 pounds and I bail the money to J. Holt to pay it to him, if J. Holt does not pay the money to him he shall have action of account against him and no other action, but by this action, he shall have only the same money though he has detained it for ten years. *Quod fuit concessum*, and then

"*Belk* said: take the money, because you shall have no other answer for us and it shall be entered upon the record that you have received them and neither of you shall be amerced, wherefore the defendant comes the first day and the plaintiff shall have good action, and so it was entered, &c."

In 1405 (6 Hen. IV,) in the Common Pleas, debt was brought to recover 40 s. delivered to the defendant by the lessee of a manor to pay to the plaintiff. It was held that the proper remedy was not debt because "there is no contract between you." Account would have been proper had there not been a frank tenement. Hence as a writ of annuity was the only remedy the plaintiff took nothing by his writ of Debt.

But Hankford, Justice, putting his decision on the ground that not debt but account would lie, made the positive and unqualified assertion that "if a man deliver certain monies to you to pay to me, I shall have action of account against

[1] Henry de Percy, Justice of the Common Pleas, 1377-1380.
[2] William Skipwith, Justice of the Common Pleas, 1376-1388.

you and not writ of debt because there is no contract between you." [1]

Account is the well recognized remedy of the beneficiary throughout the fifteenth century,[2] and continued to be so employed in the sixteenth century.

In 1458, (36 Hen. VI), Wangford's language (*arguendo*), shows unmistakably not only that the beneficiary had a right of action in account where there had been a prior appointment of the defendant, but that the old distinction between debt and account to enforce this right was becoming obliterated: "Sir, I grant willingly that this is a good plea; and the reason is because when a man pays to another certain money by my commandment to my 'oeps' [3] if he who receives this money is unwilling to pay me, I shall have a good writ of debt or account against him, and in that way I will have my money." [4]

In 1476 (15 Ed. IV), an Abbot brought a writ of account against a man alleging that he had received 100*l.* of A, predecessor of the same Abbot, from the hands of one D and C, to render an account. The defendant in vain objected, (1) that the plaintiff should have alleged that the goods belonged to the house and not to A, (2) that the receipt was from the hands of a co-monk, and that such a receipt was like a receipt from the hands of the plaintiff's wife and that the writ in such case, abated.

Brian: [5] "That is not so, for the writ is good but in such a case as you speak of, a receipt by the hands of the wife, the defendant shall have his law . . . wherefore answer to this, for the writ is good enough." [6]

In 1479 (18 Ed. IV) the existence of an alternative remedy for the beneficiary, by writ of Debt, or by writ of Account, is mooted.[7] Counsel, *arguendo* that Case was alter-

[1] Y. B. vi Hen. IV. F. 7, pl. 33, (Hil).
[2] Y. B. 1 H. V. Fol. 11, Pl. 21 (1413).
Person's Case, Y. B. x Ed. IV. f. 5, pl. 10, *con.* to folio 8, pl. 21 (1471).
[3] See *post,* p. 364, in this paper for meaning of this word.
[4] Y. B. 36 Hen. VI. Fol. 8, pl. 5 (at bottom of 9).
[5] Chief Justice of the Common Pleas, 1471-1500.
[6] Y. B. xv Ed. IV. fol. 16, pl. 2.
[7] Y. B. 18 Ed. IV. Fol. 23, pl. 5 (1479).

native with Detinue proposed the following analogy: "As if I deliver 20 pounds to Catesby to deliver to Pigot he can elect to have writ of Account against Catesby or writ of Debt."

But Brian,[1] holding that in the case in judgment, Detinue only would lie, counter-argued, "And as to what is said that he shall have action of Debt or of Account, I say that he shall have action of Account and not action of Debt, upon what thing shall his action of Debt be founded? Not upon a contract, nor upon a sale, nor upon a loan can he declare."

In 1506 (21 Hen. VII) Frowike, C. J.[2] remarked in a *dictum:* "The stranger has not other remedy except action of account."[3]

The motive which impelled the beneficiary to seek redress by the writ of debt rather than by the writ of account, is quite plain. The plaintiff in account was compelled to undergo the delay of two distinct trials, the first before a jury to determine merely his right to an accounting, the judgment for the plaintiff being that the defendant do account, (*quod computet*), and the second trial being the accounting itself before the court-appointed auditors. In the writ of Debt, on the contrary, the plaintiff, if successful in establishing the defendant to be his debtor, was entitled to judgment and immediate execution, even in the case of default. Moreover, the fixing of any liability upon a receiver at the hearing before the auditors was always contingent upon his not having been robbed, or not having lost the property without his own fault, &c. &c.[4] Once establish, however, that the defendant is not merely your receiver but your debtor, and his liability is absolute.

When the attempt was first made there were manifest obstacles to the employment of the writ of Debt by the beneficiary, though admittedly an action of Account would lie where there had been a bailment of money or chattels to the defendant upon the latter's promise to the bailor to pay the

[1] Chief Justice of the Common Pleas, 1471 to 1500.
[2] Thomas Frowyk, Chief Justice of the Common Pleas, 1502-1506.
[3] Anonymous, Keilwey, 77 a, 77 b. Pl. 25.
[4] See American Law Register, Vol. 56, Old Series, (47, New Series), (University of Pennsylvania Law Review) page 74, note 2.

plaintiff a sum certain. There was no privity between plaintiff and the defendant.[1] The argument at first seemed unanswerable: "there is no contract between you." The defendant being a receiver, was accountable, but not being a debtor how could he be liable in the writ of Debt?

The moral pressure of the plaintiff-accountee, seeking to recover by writ of debt, finally forced the courts to treat a receiver as a debtor. The successful argument was that if the plaintiff showed a demand upon the defendant for an account and the latter refused or failed to render an account he had presumably converted to his own benefit, all the property bailed and hence had made himself the plaintiff's debtor.[2]

Long prior to 1573 the alternative remedy of the beneficiary by writ of debt was clearly established. Sir Robert Brooke, who sat as Chief Justice of the Common Pleas from 1554 to 1558, states in his "Graunde Abridgment"[3] published in 1573, that "where ten pounds is paid to W. N. to my use I shall have action or Debt or of Account against W. N." Brooke cites a precedent then over a hundred years old — the above mentioned Year Book, 36 H. 6. f. 8, pl. 5. And in the last year of the reign of Elizabeth there is this dictum, if not judgment, of the Queen's Bench: "adjudged, although no contract is between the parties, yet when money

[1] See Brian, C. J.'s opinion *supra* in Y. B. 18 Ed. IV. Fol. 23, pl. 5.

[2] Professor Langdell has thus explained the step by which a receiver to account could be made a debtor in II H. L. R. 253.

See American Law Register, Vol. 56, Old Series (47, New Series), (University of Pennsylvania Law Review) pages 74, 75, notes 4, 5.

Rastell's Entries, p. 159, (London, 1670), contains two Counts in Debt by the beneficiary of which the following is a translation of the first: —

"Debt upon bailment by another to bail to the plaintiff. T. G. in mercy for several defaults, etc., the same T. was summoned to reply to J. N. of a plea that he render to him 40 s. which he owed him and wrongfully detains, etc., and, thereupon the same J. by his attorney, R. L., says that whereas a certain P. R., the last day of January of the thirty-first year of the reign of the present Lord the king, at B. had delivered to T. G. aforesaid 40 s. to pay and deliver to the same J. N. whenever the said T. G. should be required by the said J; nevertheless, T. G., though often requested, the said 40 s. to the said T. G., had not yet given but refused to deliver them and still refuses, whereby he says that he is injured and has damage to the value of four marks. And thereupon he brings his suit, etc.

[3] Dette, 129: "Debt by Wange & Bittinge where 10 pounds is paid to W. N. to my use I shall have action of debt or of account against W. N. and this agrees with an old book of entries of pleas."

or goods are delivered upon consideration to the use of A, A may have debt for them."[1] As in the action of Account there was no wager of law where the plaintiff counted that the defendant had received the money or goods at the hands of a stranger;[2] neither did that mediæval mode of trial embarrass the plaintiff accountee, who, by establishing a demand and default thus converted his accountant or receiver into his debtor.[3]

In 1587, in the Queen's Bench, in 30 Eliz., in an action of account, Andrews et ux. and one Cocket declared against Robsert that he, Robsert, on 20 Aug., 10 Eliz., was the receiver of the money of the said Cocket and Ann, the wife of the plaintiff Andrews.

"It was found by special verdict that the 10 Aug., 10 Eliz., one M gave the said 100 pounds for the relief of the said Cocket and Ann and delivered the same to the said

[1] *Whorewood* v. *Shaw,* Yelverton, p. 25, S. C. Moore 667, where the action appears to be upon a specialty.

[2] "In an action of Account against a Receiver upon a receipt of money by the hand of another person for account render (unless it be by the hands of his wife or his co-monk) the defendant shall not wage his law because the receipt is the ground of the action, which lieth not in privity between the plaintiff and defendant, but in the notice of a third person, and such a receipt is traversable." *Coke Inst. p.* 295, *Title of Releases. Lib. III, Chap. viii, Sec.* 514 *Ley Gager.*

Coke's statement is supported by Y. B. XV Ed. iv. fol. 16, pl. 2; Y. B. 38 Hen. vi, Fol. 9, pl. 11. Y. B. 47 Ed. III, Fol. 16, pl. 25. Y. B. xviii H. viii F. 3, pl. 15.

To the same effect see Brooke, Ley Gager, 1., 54.

Illustrations where there were accordingly jury trials in the case of accountants who had received money or other property at the hands of a stranger, are:

Huntley *v.* Fraunshane, Coke's Entries, p. 47; S. C. Dyer, Folio 183, pl. (60); Cocket *v.* Robsert, 1 Lutwyche, p. 47, Title "Account"; Tresham *v.* Ford, Croke's Eliz. 830 (1601).

Saunders, *arguendo* in Hodsden *v.* Harridge, 2 Saund. 65 (21 & 22 Car. II) said: "And this case may be compared to the case of an action of account, where if the plaintiff declare against the defendant on a receipt *by other hands*, the defendant shall be ousted of his law, on account of the presumption of law that the country had notice of it."

[3] After Slade's Case the decisions in Indebitatus Assumpsit in favor of the beneficiary eliminated any such mode of trial even if it was ever available to the plaintiff's accountant when charged in Debt as debtor for money or goods bailed by a third person for plaintiff's benefit and converted to the defendant's use. The cases found by the writer where Debt was brought by the beneficiary are not explicit as to the denial of Ley Gager though such was probably the rule.

In Y. B. 38 H. VI. fol. 5. pl. 14, in a somewhat analogous situation (Debt on a balance found by auditors appointed by the plaintiff) two judges of the King's Bench thought there ought to be no Ley Gager.

Wase, then his servant, to the intent he should deliver it to the said Robsert for the relief of the said Ann and Cocket; and that he, the said Wase, did deliver it to the said Robsert for the relief of the said Ann and Cocket, according to the said intent."

. . . "It was adjudged he shall be said to be their receiver, and that he shall account with the said then plaintiffs for the said 100 pounds."[1]

The end of the reign of Elizabeth which is substantially the date of Slade's Case,[2] will afford for many reasons a convenient stopping place for retrospection. The cases of the Stuart period and in fact of all successive reigns, can be understood only in the light of Slade's Case.[3]

The principles underlying the substantive right of the beneficiary to bring an action of debt or an action of account at common law may now be summarized from the preceding and other cases.

First, however, the phraseology of mediæval law must be

[1] The entire Record of this case is given in Andrews et ux. & Cocket *v.* Robsert, 1 Lutwyche, p. 47, title Account. The following is a translation of the pleadings:

Tho. Andrews & Anne Wife, & Arthur Cocket *v.* Arthur Robsert.

Arthur Robsert was summoned to answer unto Thomas Andrews and to Anne his wife and to Arthur Cocket, Gentleman, in a plea that he render unto them his reasonable account of the time in which he was receiver of the said Anne and Arthur, etc. And then the same Thomas is his proper person and the aforesaid Anne and the aforesaid Thomas C. by the same T. his attorney say that whereas the aforesaid Arthur Robsert on the day &c. year &c. at F. in the County aforesaid had received of the monies of the said Anne and Arthur Cocket when the said Anne was single, to wit by the hands of John Wase, Gent., £100 to account to the same Anne and Arthur Cocket when he should be requested to render the same thereunto, nevertheless the same Arthur Robsert though often requested his reasonable account aforesaid to the said Anne and Arthur Cocket, while the said Anne was *sole* or to the said Thomas, Anne and Arthur Cocket after the nuptials celebrated between them, did not render, but he refused to render it to them and still refuses, wherefore, &c.

And the aforesaid Arthur Robsert by W. C. his attorney comes and defends the force and injury whereof, &c. And he says that he never was his receiver of the aforesaid £100 nor of any penny thereof by the hand of the aforesaid John Wase to account thereof to the aforesaid Anne and Arthur Cocket when he should be requested to render an account as the aforesaid Thomas and Anne and Arthur Cocket have above declared against him. And of this &c.

[2] 4 Rep. 927 (1602).

[3] The cases of the seventeenth century have been collected and discussed by the writer in American Law Register, Vol. 56, Old Series, (47 New Series), (University of Pennsylvania Law Review, page 73).

considered; for the mediæval lawyer had a legal vocabulary of his own, and unless we understand his terms we cannot understand the substantive rights which his law recognized. "The word contract was used in the time of the Year Books in a much narrower sense than that of to-day. It was applied only to those transactions where the duty arose from the receipt of a *quid pro quo*, *e. g.*, a sale or loan. In other words, contract meant that which we now mean by 'real contract.' What we now call the formal or specialty contract was anciently described as a grant, and obligation a covenant, but not as a contract."[1]

The rule was clearly this, that a third person could recover in the action of Account against a defendant, notwithstanding there was no "contract" between them. Taking the word "contract" in its true mediæval sense of a debt, as used in the Year Books we immediately perceive that the plaintiff in Account and Debt was not required to have furnished the property or thing bailed.

The rule is equally plain that the plaintiff in Account and Debt was not required to be privy to the "contract" or, as we would now say, "the promisee."

The right of action of the beneficiary in Account should be considered in further detail. Historically, this remedy of the beneficiary antedates his action of Debt, doubtless because in account there was never required to be a "contract" between the plaintiff and the defendant.

"A receiver is one who receives money belonging to another for the sole purpose of keeping it safely and paying it over to its owner."[2]

No one could be your receiver unless he had received *money*. The receipt of chattels when the obligation was to sell them and convert them into money constituted the defendant not a receiver, but a bailee, who was also liable in Account.[3]

[1] "Parol Contracts Prior to Assumpsit," by James Barr Ames, viii. Harvard Law Review, page 253, note 3; Essay No. 60, in this Collection.

[2] Langdell: "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 244 (1889).

[3] Langdell, "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 244 (1889). See 46 E. 3. f. 3, pl. 6.

Certainly after 1379 it was never necessary, in order to constitute a man your receiver and therefore to render him accountable to you, that he should have received the money from you.

"If money be delivered by A to B in order that it may be delivered by B to C, or if it be delivered by A to B to the use of C, it has often been held that B will be accountable to C." [1]

It thus became firmly settled that it was not necessary for the receiver to have actually received the money from the plaintiff. If, in the course of his dealing with another person, the defendant became the receiver of money due the plaintiff, though the plaintiff was not privy to the transaction or even aware of it, he could enforce it.

In a case of account by a legatee against executors the objection was made: "How can the daughter who never bails the money to the executors have account?" To which Lord Brooke answered: "I command you to receive my rents and deliver them to Lord Dyer, he shall have account against you: yet he did not bail the money." [2]

"If a man deliver money to you to pay to me, I shall have account against you, although he may be but a messenger.[3]

"A man shall have a writ of account against one as bailiff or receiver where he was not his bailiff or receiver; for if a man receive money for my use, I shall have an account against him as receiver; or if a man do deliver money unto another to deliver over unto me, I shall have an account against him as my receiver." [4]

In 1489 (4 Hen. VII) it is said by Brian [5] *per dictum:*

"And sir, if I have lands, and a man receives my rents, and without my assent, still he is receiver &c. because the receipt charges him etc." [6]

[1] Langdell, "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, page 249.
[2] *Paschall* v. *Keterich*, Dyer, 152, note.
[3] 1 Roll. Abr. Accompt (A) pl. 6.
[4] Fitzherbert Natura Brevium, Account [117] Q. Rolle Abr. Accompt (A) pl. 6.
[5] Thomas Bryan, Chief Justice of the Common Pleas, 1471 to his death in 1500.
[6] Y. B. 4 Hen. vii. Fol. 6, pl. 2.

Ownership by the third party beneficiary, of the money or thing bailed was neither essential to, nor was it at all present in, the basis of the right to bring account or debt.

It is perfectly true, as has been said by Professor Ames, that in debt, "the defendant was conceived of as having in his possession something belonging to the plaintiff which he might not rightfully keep, but ought to surrender."[1] But Professor Ames here is describing an early juridicial conception; and he does not mean that in every case the thing sought must be proved to have belonged to the plaintiff. This conception was in reality the explanation of the judicial reasoning by which debt for property loaned by the plaintiff[2] expanded in an early age of the common law into debt for money due on a "real contract."

"In its earliest stage the action is thought of as an action whereby a man 'recovers' what belongs to him. It has its root in the money loan; for a very long time it is chiefly used for the recovery of money that has been lent. The case of the unpaid vendor is not — this is soon seen — essentially different from that of the lender: he has parted with property and demands a return."[3] Of course, by 37 Hen. VI (1459) any idea that the plaintiff vendor really owned the money due on a sale of a chattel has disappeared, and the conception has become merely a legal fiction.

In debt, if the *quid pro quo* was a chattel, the title to or the ownership of it was by the delivery absolutely vested in the debtor.

Where A loaned money to B and then brought debt for its recovery, the legal title to the money bailed was always in B, otherwise the very intention of the loan would be defeated — *i. e.*, if B could not transfer title to the money he could have no benefit from the loan.[4] Where A promised

[1] Ames's "Parol Contracts Prior to Assumpsit," viii Harvard Law Review, at page 260 (1894).

[2] Pollock and Maitland's History of English Law, vol. ii, page 208.

[3] See note 1 *supra*.

[4] "The subject of a loan may be either a specific thing, as a horse or a given quantity of a thing which consists in number, weight, or measure, as money, sugar, or wine. In the former case it is of the essence of the transaction that the thing lent continue to belong to the lender: otherwise the transaction is not a loan.

"In the latter case, the thing lent may (and commonly does) cease

B "that if he is willing to carry 20 quarts of wheat of my Master Prisot to G, he shall have 40 shillings,"[1] no one in the time of Henry VI or to-day would contend that the title to any specific 40 shillings was ever in B. The situation is not different where A gives B 40 shillings to give to C. B after the conversion is C's debtor, but C does not have the title to any specific 40 shillings. Of course, A can say to B, give C this bag of coins or these particular crowns, and then no title passes to B, for the title, so far as B is concerned, is always either in A or C, according to the nature of the

to belong to the lender and become the property of the borrower, such a loan commonly being an absolute transfer of title in the thing lent from the lender to the borrower. The reason why such a transfer of title takes place is obvious. The object of borrowing is to have the use of the thing borrowed; but the use of things which consist in number, weight, or measure commonly consumes them; and this use, of course, the borrower cannot have unless he owns the things used. When such things are lent, therefore, it is presumed to be the intention of both parties, in the absence of evidence to the contrary, that the borrower shall acquire the title to them.

But why then call the transaction a loan? The answer is, that, in every particular except the transfer of title, it is a loan; that the title is transferred for the purpose of making the loan effective as such, and because it is immaterial to the lender whether he receives back the identical thing lent or something else just like it. Moreover, the difference between a loan of money, for example, and a loan of a specific article, is not commonly present to the minds of the parties; the lender of money thinks the money lent still belongs to him, and that the borrower has acquired only the right to use it temporarily; he is aware that the borrower is entitled to transfer to other persons the identical coins lent, and that he has the option of returning to him, the lender, either the identical coins borrowed or others like them; but he is not aware that these rights in the borrower are inconsistent with his retaining the title to the money lent. In other words, he supposes (and, in every view except the strict legal view, he is right in supposing) that he may own a given sum of money without owning any specified coins; and that the only substantial difference between money in his own coffer and money due to him is, that in the former case he has the possession, while in the latter he has not.

A debt, therefore, according to the popular conception of the term, is a sum of money belonging to one person (the creditor), but in the possession of another (the debtor). There is also much reason to believe that this popular conception of a debt was adopted by the early English law, at least for certain purposes. Thus, the action of debt (which was established for the sole and exclusive purpose of recovering debts of every description) was in the nature of an action *in rem*, and did not differ in substance from the action of detinue; the chief differences between them being that the latter was for the recovery of specified things belonging to the plaintiff, the former, of things not specified." Langdell's Summary of Contracts, Sections 99, 100.

[1] Year Book, 37 Hen. VI, pl. 18 page 8.

transaction between them. B is then not a debtor but a bailee, and is liable to C in an action of detinue.

Thus in 1339 detinue was brought for 20 pounds "in a bag sealed up, etc., etc." The defendant objected to the writ on the ground "that he demands money, which naturally sounds in an action of debt or account." The plaintiff replied, "We did not count of a loan which sounds in debt, nor of a receipt of money for profit, which would give an action of account, but of money delivered in keeping under seal, etc., which could not be changed." The defendant was required to answer over.[1]

But where money in an unsealed bag was delivered, "one penny cannot be known from another in a bag, we are of opinion that detinue does not lie and therefore reverse the judgment."[2]

"When the defendant receives money belonging to the plaintiff but receives it under such circumstances that he has a right to appropriate it to his own use, making himself a debtor to the plaintiff to the same amount, and the defendant exercises such right, the receipt of the money will create a debt."[3]

Surely therefore there is sufficient warrant for the induction that although title did not exist in the beneficiary to the specific goods or money bailed to the defendant, this fact constituted no objection either to the beneficiary's right to have an account or to his later right to treat as his debtor the accountant who failed to produce an account of the property bailed by a stranger for the plaintiff's benefit.

The nature of the action of account imposes this limitation upon the beneficiary that he can have no remedy unless property has been transferred to the accountant by the stranger. Hence, mutual promises between the defendant

[1] Y. B. 12 & 13 Edw. III, 244. Ames' Cases on Trusts, vol. i, p. 52.

[2] Banks *v.* Whetstone, 1 Dyer 22 b, note 137: "The chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain detinue against the bailee." — "Ames' Parol Contracts Prior to Assumpsit," vi Harvard Law Review, at p. 258.

[3] Langdell: "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review, at page 245 (1889).

and a stranger could never make the defendant accountable to the plaintiff.[1] Notwithstanding the fact that the conception of a *quid pro quo* expanded so as to comprise services performed on request as well as property delivered,[2] the writer has been unable to discover any case wherein a beneficiary has recovered upon a bilateral contract made between the defendant and a stranger,[3] even though that bilateral contract has been afterwards executed by the stranger's performing some act other than the delivery of property &c. to the defendant.[4]

Undoubtedly however, the defendant has always been liable in the action of account when the defendant has received property though from a stranger, under a promise to account in respect thereof to the beneficiary. It would be incorrect however to say that this action will lie upon "an executed consideration." Though a consideration may be executed by the promisee, the promisor does not thereby become accountable to the plaintiff-beneficiary.

A later age, the legal phraseology of which, as applied in assumpsit, has invaded all our conceptions of contractual liability, will speak of an "executed consideration;" but in the actions of Account and of Debt, from the earliest to the latest times, there was no consideration, and hence it tends only to confusion of thought to say that "the consideration" must be "executed" and not "executory."

Therefore to state the doctrine of accountability to a beneficiary with accuracy, we should say that the defendant could be made accountable to the plaintiff only where prop-

[1] Archdale *v.* Barnard, 1 Rolle Abr. p. 30, pl. 3.

[2] See American Law Register, Vol. 52, Old Series, (43 New Series), pages 776, 777, 778, 779.

[3] Hence the modern case Crow *v.* Rogers, 1 Strange, 592 (1724), presented no case of accountability or debt and the conclusion properly reached in that case does not impinge upon the doctrine of accountability to the beneficiary.

[4] Thus in Ritley *v.* Dennet, 1 Rolle's Abridgment, p. 30 (Trin. 4 Jac. B. R.) the abridger states: "If C is indebted to A and D is indebted to N in the sum of 20 pounds and C at the request of D pays the 20 pounds for him to N, and directs D to pay so much over to A for him, and D in consideration of the premises, promises to pay the 20 pounds to A, A cannot save action on the case on this promise against D for he is a stranger to it and there is not consideration for any assumpsit to him."

erty had been bailed or land had been conveyed, or money had been received for the plaintiff's benefit (i. e. to pay him money or give him an account); and this conveyance or bailment might be at the hands of a stranger.

THE DEBT AND THE ACCOUNTABILITY DISTINGUISHED FROM A TRUST

In the action of debt, the relation of the debtor to both the beneficiary and the *quid pro quo* is plainly distinguishable from the relation of the modern trustee to the *cestui que trust*, and to the "trust property." This distinction is demanded nowadays, because the tests which determine a trust are not those which determine an accountability or a debt.

The practical consequence of confounding debts or accountabilities with trusts is to erroneously limit the right of action of the beneficiary at common law to only those cases which fulfil the requisites of a modern trust.[1]

The modern trust, with its conception of a double title to the trust property, — i. e., of a distinct "equitable ownership" apart from the legal title, — was a conception which developed in the Court of Chancery many years after the right of the beneficiary in Account and in Debt had been established at law. The *cestui que trust* in later times recovers, because as to certain specific property he has a title recognized by Chancery. The above conceptions of liability in Account and in Debt are radically distinct from that of the trust. The bailee has ownership of the thing as to which he must render an account. The *quid pro quo*, if a chattel, becomes, as above stated, the absolute property of the debtor. His receipt of it gives rise to an obligation to pay the beneficiary; but no one ever supposes that the beneficiary's right to recover is based on any "equitable ownership" of the chattel, or of the sum of money recovered.

[1] In a number of decisions of New York, New Jersey and of Pennsylvania the beneficiary recovers though there is no trust. Professor Williston has criticized the Pennsylvania decisions as being "apparently an unwarranted extension of the law of trusts," in 15 Harvard Law Review, p. 780, note 9. From this view the present writer dissents.

It has been said by Professor Ames that "A plaintiff entitled to an acount was strictly a *cestui que trust;*"[1] and further, that "trusts for the payment of money were enforced at common law long beefore Chancery gave effect to trusts of land. It need not surprise us, therefore, to find that upon the delivery of money by A to B *to the use of* C, or to be delivered to C, C might maintain an action of account against B."[2]

This language is an apt analogy or simile, but does not represent, and was doubtless not intended to represent, an exact equation.

Misapprehension will arise if the position of the beneficiary in account is understood as identical with that of the modern *cestui que trust* in equity.

If A transfers chattels or stock to B, directing B to apply the rent or income of the property to the payment of A's creditor, X, there arises, by the doctrine of trusts, a double title, one equitable in X, and the other legal in B, and the situation is called in equity a trust.

If A gives chattels to B in such a way that the chattels are the absolute property of B, and in consideration thereof B promises A to pay A's creditor, X, there is no trust whatever.

While it is true that the action of account is based on the conception that something — *viz.*, an account — belonging to one man, the plaintiff, is in the possession of another man, the defendant, we have above shown that no specific money is supposed to be owned by the plaintiff. His right is only to receive an equivalent sum. In account, the defendant's "obligation must be capable of being discharged by return-

[1] "Parol Contracts Prior to Assumpsit," viii Harvard Law Review, p. 258 (1894); Essay No. 60, in this Collection.

[2] Ib.

Year Book, 12 and 13 Edw. III, 244; Ames, Cases on Trusts, vol. i, page 52.

Banks v. *Whetston,* 1 Dyer, 22 b. note 137: "The chattel might be delivered to the bailee to be delivered to a third person, in which case the third person was allowed to maintain detinue against the bailee." Ames, "Parol Contracts Prior to Assumpsit," vi Harvard Law Review, at page 258; Essay No. 60, in this Collection.

Langdell, "A Brief Survey of Equity Jurisdiction," ii Harvard Law Review at page 245 (1889).

ing to the plaintiff (not the identical money received, but) any money equal in amount to the sum received."[1] In the former of the two above stated cases, X has by the modern doctrine of trusts an equitable title with respect to the chattels. In the latter case, he has no equitable title, but he has the right to recover in the common law action of account.

The right of action of the beneficiary at common law in account was therefore different from that of a *cestui que trust*, because the former had a right of action notwithstanding the fact that the title to the property might be vested absolutely and solely in the defendant.

This distinction between a trust and an accountability to, or receivership in favor of, a third party is of much consequence because the second of the two above hypothetical cases (i. e., where no modern trust exists) is a typical formula expressing the right of a third party to recover at common law in account.

The cases cited by Professor Ames have all been examined without disclosing anything inconsistent with this conclusion.

The first reported cases in Chancery where the heir or transferee of the title of *cestui que use* compels "the feofee to uses" to convey[2] are of the reign of Edward IV,[3] and are readily explained on the ground of a duty imposed by Chancery on the conscience of the feofee to uses without resorting to any conception of "equitable ownership."

We find the right of the beneficiary in account recognized as early as 1364-1368,[4] where the transaction is described as a bailment and not yet as a transfer of property "*al oeps*." The first case the writer has found where the words "*al oeps*" are used in this connection was in 1458.[5]

If we look to the then contemporaneous chancery doctrine of uses, we find nothing to indicate that a use in Chancery in the fourteenth and fifteenth centuries was more than a

[1] Langdell: ii Harvard Law Review, page 246.
[2] *Archbishop of York* v. *Richard Osborn and Edward Gower*, Cal. 94; Spence's Equitable Jurisdiction, page 454.
[3] See Chancery Calendars.
[4] Y. B. 41 Ed. III, folio 10, pl. 5. Y. B. 47 Ed. III, folio 16, pl. 25.
[5] Y. B. 36 Hen. vi, Fol. 8, pl. 5.

personal right of *cestui que use*, his heirs, devisee, or assignee, against the feofee to uses.

The authorities collected by Professor Ames establish beyond question that as late as 1450 the heir of the feofee to uses held the land free from liability to the *cestui que use*.[1]

A use might be enforced by the heir, etc., "but neither a wife, a husband, nor a judgment creditor was entitled to this privilege."[2] "If the feofee to uses died without heir or committed a forfeiture or married, neither the lord who entered for the escheat or forfeiture nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom the dower was assigned, were liable to perform the trust, because they were not parties to the transaction, but came in by act of law, or in the *post*, and not in the *per*, as it was said, though doubtless their title in reason was no better than that of the heir against whom the remedy was extended. It was the same as regards any other person who obtained possession, not claiming by any contract or agreement with the feofee, between whom and the *cestui que use*, therefore, there was no privity. 'Where there was no trust, there could be no breach of trust.' The remedy against a disseisor, therefore, was not in Chancery at the instance of the *cestui que trust*, but at law at the instance of the feofee; and it was part of his duty to pursue his legal remedies at the desire of the *cestui que trust*."[3]

Uses of personalty were doubtless enforced in Chancery at an early date,[4] but in debt and account there is not the slightest ground for believing that the recovery of a beneficiary was based on any ownership, equitable or otherwise, of any specific coins or chattels, or that the defendant in account could ever be restricted from transferring the title to both the money received and the property bailed. It has been previously shown that the same is true of the title to the *quid pro quo* in debt. The modern characteristic of

[1] Ames' Cases on Trusts, vol. i, p. 345, notes, 1 & 2.
[2] Spence's Equitable Jurisdiction, p. 446.
[3] Spence's Equitable Jurisdiction, page 445, citing Year Book II Hen. VIII, 24: "The king or lord by escheat cannot be seised to an use or trust for they are in the *post* and are paramount to the confidence." Jenk. Ca. xcii.
[4] See Spence, page 456, note h (temp. Hen. VI).

equitable ownership — the right to compel the trustee to devote the *res* to the designated purposes — was precisely what courts of law in account never dreamed of attempting. If complete title had not been transferred to the bailee or receiver, the very purpose of the bailment *ad merchandisandum* would have been frustrated and so of the bailment to sell and render account to the beneficiary. A court of law was obviously without the machinery to enforce such an equitable title had it existed.

It is, of course, true that judges and counsel, in speaking of the plaintiff's right of recovery in account, refer to his "property" in the money sought to be recovered.[1]

But this means no more than the similar popular conception that we have seen existed in regard to debt and which survives to-day in the popular expression "money in the bank."[2]

It is true that the cases in account speak of the defendant's having received the money "*al oeps*" of the plaintiff.[3]

But in reading cases of debt and account in the fifteenth, sixteenth, and seventeenth centuries we must not mistranslate "*oeps*" — use, still less should we translate "*oeps*" — trust. The word "*oeps*" is derived from the Latin opus, signifying benefit, and not from the word *uses*,[4] a term of definite legal meaning in the civil law.[5]

[1] See Cases in Year Books, *ante*.

[2] "The repayment of an equivalent sum of money is equated, with the bold crudity of archaic legal thought, to the restitution of specific land or goods. Our Germanic ancestors could not conceive credit under any other form. After all, one may doubt whether the majority of fairly well-to-do people, even at this day, realize that what a man calls 'my money in the bank' is a mere personal obligation of the banker to him." "Pollock's Contracts in Early English Law," vi Harvard Law Review, page 399 (1892).

[3] See *ante*, Cases in Year Books. See also Year Book 2 Hen. IV, pl. 50, folio 12.

[4] "The Origin of Uses," by F. W. Maitland, viii Harvard Law Review, page 127 (1894); Pollock and Maitland's History of English Law, vol. ii, pages 228-240.

[5] "The germ of agency is hardly to be distinguished from the germ of another institution which in our English law has an eventful future before it, the 'use trust or confidence.' In tracing its embryonic history we must first notice the now established truth that the English word *use* when it is employed with a technical meaning in legal documents is derived, not from the Latin word *usus*, but from the Latin word *opus*, which in old French becomes *os* or *oes*. True that the two words are in course of time confused, so that, if by a Latin document land

Thanks to Professor Maitland's researches, we have direct evidence that for many years "*oeps*" was used merely to signify a benefit and without any settled technical signification, either of a later Chancery trust or of a civil law "*usus*."

His researches show that in 1238-9 Bracton records that "a woman, mother of H, desires a house belonging to R; H procures from R a grant of the house to H to the use (*ad opus*) of his mother for her life." [1]

As late as the year 1339 occurs a case, not mentioned by Professor Maitland, where the word "*oeps*" is used unmistakably in the sense of benefit and without any suggestion of a legal and equitable title. In Year Book XII and XIII Edward III, page 231 (1339) occurs the description of a feudal conveyance, and in describing the transaction the language applied to the vendors is: "Il vendront et rendront en la court le seignur *al oeps* celui qe serra feffe et les baillifs front execution."

The note of the editor of this translation of the Year Books shows that the words "*ad oeps*," which he has translated "to the use," are in the record "*ad opus*."

"We hardly need say that the *use* of our English law is not derived from the Roman 'personal servitude;' the two have no feature in common. Nor can I believe that the Roman *fideicommissum* has anything to do with the evolution of the English *use*. In the first place, the English *use* in its earliest stage is seldom, if ever, the outcome of a last will, while the *fideicommissum* belongs essentially to the law of testaments. In the second place, if the English *use* were a *fideicommissum* it would be called so, and we should not see it gradually emerging out of such phrases as *ad opus* and *ad usum*. What we see is a vague idea, which developing in one direction becomes what we now know as agency, and developing in another direction becomes that *use* which the common law will not, but equity will, protect. Of course,

is to be conveyed to the use of John, the Scribe of the Charter will write *ad opus Johannis*, or *ad usum Johannis* indifferently, or will perhaps adopt the fuller formula, *ad opus et ad usum*, nevertheless the earliest history of 'the use' is the early history of the phrase *ad opus*." — Maitland, "The Origin of Uses," viii Harvard Law Review, page 127.

[1] F. W. Maitland: "The Origin of Uses," viii Harvard Law Review, page 134.

again, our 'equitable ownership' when it has reached its full stature has enough in common with the praetorian *bonorum possessio* to make a comparison between the two instructive; but an attempt to derive the one from the other would be too wild for discussion."[1]

The present investigation does not involve such recondite issues as whether or not, and if so, to what extent, Chancery was indebted to the civil law for the doctrine of uses.

The cases taken from the Year Books show that the word "*oeps*" is frequently used in describing the beneficiary.

The writer submits that there is not the slightest reason to believe that either in the Year Books or in Rolle the word "*oeps*" or "use," etc., was used in the technical meaning of a modern trust — i. e., to convey the idea of equitable ownership and a double title. What is here contended is that in the cases of debt and account in the Year Books the word "*oeps*" or "*opus*" is used in the then familiar and common everyday meaning of benefit.[2] In debt or account it was enough if the chattel or money was received for the benefit of a third person. The beneficiary recovered in debt or in account, not because he was a "*fructuarius*" under the civil law, nor because he was a "*cestui que trust,*" that later

[1] F. W. Maitland, "The Origin of Uses," viii Harvard Law Review, page 137.

[2] Year Book 10 Hen. VI, 6, pl. 19: "A man brought writ of debt against an executor and recovered and had fieri facias to the sheriff of London, and levied the money of the goods of the deceased. And the sheriff returned that he had no goods of the deceased, but that they had goods long time before the writ and he delivered and had sold the goods and converted the sum to their own *oeps*."

Year Book 10 Hen. VI, 11, 38: "Bakington. The husband shall have good action in this case that you have put and it is not against reason that the husband shall be charged of this debt, for the freehold was in him as well as in the wife during the coverture, and all profits of the land he took to his own *oeps*."

Year Book 4 Ed. III, 50 pl. 45: "One A brought his writ of account against G, *de tempore quo fuit receptor denarr,* and counted that he received 20 pounds to trade, etc., and of this good and legal account rendered, and said if he would deny it he had good suit, and see here the deed which witnesses it; and it was read and said that G had received 20 pounds of the aforesaid A and P, his wife to profit to the *oeps* of the aforesaid A and P, and bound themselves to pay 20 pounds on a certain day to the aforesaid A and P."

Year Book 4 Ed. III, 31 pl. 38 (last of case): "*Thorpe.* Say whether she administered as executrix, or not, as this writ charges; for peradventure if she claims all to her own *oeps,* and does not make distribution for alms, then she did not administer as executrix."

protégé of Chancery, but because the primary obligation known as a debt or a receivership had been created for the plaintiff's benefit by the defendant's receipt of money or property.

As account was not based on contract (i. e. in the nineteenth century use of that word), the liability of the defendant to account to the beneficiary presupposed no prior contractual relation of any kind between them. The phrase "stranger to the consideration," as applied to the plaintiff in account, would have been meaningless jargon to the lawyers of the fourteenth and fifteenth century. After four centuries the phrase has become no more applicable.

Nor was the plaintiff in account required to be the promisee. Privity to the defendant's obligation was a pure fiction. "If, however, he obtain possession in the plaintiff's behalf and as his representative, *though without any actual authority*, the plaintiff may adopt and ratify his acts, and thus establish privity between him and the plaintiff."[1]

Debt and accountability were therefore primary common law liabilities and species of simple contract enforceable by the beneficiary, not because he was a "privy" to the contract, or a "promisee" or a "*cestui que trust*," or had furnished that "mystery" of the eighteenth and nineteenth centuries — "the consideration." We err in attempting to analyze into constituent elements a substantive right which is itself primary and elemental.

The beneficiary recovered in Account because the judicial instinct recognized that he ought to recover, and the courts held that by common law he had a substantive right. This common law right was the expression of a public sense of justice, and a firmer foundation for a positive rule of law need not be sought.

> "Justinian's Pandects only make precise
> What simply sparkled in men's eyes before,
> Twitched in their brow or quivered on their lip,
> Waited the speech they called but would not come."

[1] Langdell, "Brief Survey of Equity Jurisdiction," ii Harvard Law Review, pages 248, 249.

63. THE HISTORY OF AGENCY[1]

By Oliver Wendell Holmes, Jr.[2]

I PROPOSE in these lectures to study the theory of agency at common law, to the end that it may be understood upon evidence, and not merely by conjecture, and that the value of its principles may be weighed intelligently. I first shall endeavor to show why agency is a proper title in the law. I then shall give some general reasons for believing that the series of anomalies or departures from general rule which are seen wherever agency makes its appearance must be explained by some cause not manifest to common sense alone; that this cause is, in fact, the survival from ancient times of doctrines which in their earlier form embodied certain rights and liabilities of heads of families based on substantive grounds which have disappeared long since, and that in modern days these doctrines have been generalized into a fiction, which, although nothing in the world but a form of words, has reacted upon the law and has tended to carry its anomalies still farther. That fiction is, of course, that, within the scope of the agency, principle and agent are one. I next shall examine the early law of England upon every branch of the subject, — tort, contract, possession, ratification, — and show the working of survival or fiction in each. If I do not succeed in reducing the law of all these branches to a common term, I shall try to show that at least they all equally depend upon fiction for their present exist-

[1] This Essay originally formed two lectures delivered by the author in 1882 while professor in the Law School of Harvard University. They were first published in the Harvard Law Review, 1891, vol. IV, pp. 345-364, vol. V, pp. 1-23.

[2] A biographical note of this author is prefixed to Essay No. 41, in Vol. II of this Collection.

ence. I shall prove incidentally that agency in its narrower sense presents only a special application of the law of master and servant, and that the peculiar doctrines of both are traceable to a common source. Finally I shall give my reasons for thinking that the whole outline of the law is the resultant of a conflict at every point between logic and good sense — the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust.

A part of my task has been performed and my general view indicated in my book on the Common Law. It remains to discuss the matter systematically and in detail, giving due weight to the many difficulties or objections which are met with in the process.

My subject extends to the whole relation of master and servant — it is not confined to any one branch; so that when I choose the title "Agency," I do not use it in the strict sense just referred to, but as embracing everything of which I intend to treat.

The first question proposed is why agency is a proper title in the law. That is to say, Does agency bring into operation any new and distinct rules of law? do the facts which constitute agency have attached to them legal effects which are peculiar to it, or is the agency only a dramatic situation to which principles of larger scope are applied? And if agency has rules of its own incapable of being further generalized, what are they?

If the law went no farther than to declare a man liable for the consequences of acts specifically commanded by him with knowledge of circumstances under which those consequences were the natural results of those acts, it would need no explanation and introduce no new principle. There may have been some difficulty in arriving at this conclusion when the intervening agent was a free person and himself responsible. Speaking without special investigation, I do not remember any case in early law in which one could charge himself thus in contract or even in tort. Taking the allied case of joint trespassers, although it long has been settled that each wrong-doer is liable for the entire damages, the objection

that "the battery of one cannot be the battery of the other" prevailed as late as James I.[1] It is very possible that liability even for the commanded acts of a free person first appeared as an extension of the liability of an owner for similar acts by his slave.

But however this may be, it is plain good sense to hold people answerable for wrongs which they have intentionally brought to pass, and to recognize that it is just as possible to bring wrongs to pass through free human agents as through slaves, animals, or natural forces. This is the true scope and meaning of "*Qui facit per alium facit per se*," and the English law has recognized that maxim as far back as it is worth while to follow it.[2] So it is only applying the general theory of tort to hold a man liable if he commands an act of which the natural consequence, under the circumstances known to him, is harm to his neighbor, although he has forbidden the harm. If a trespass results, it is as much the trespass of the principal as if it were the natural, though unwished for, effect of a train of physical causes.[3] In such cases there is nothing peculiar to master and servant; similar principles have been applied where independent contractors were employed.[4]

No additional explanation is needed for the case of a contract specifically commanded. A difficulty has been raised concerning cases where the agent has a discretion as to the terms of the contract, and it has been called "absurd to maintain that a contract which in its exact shape emanates exclusively from a particular person is not the contract of such person [*i. e.*, the agent], but is the contract of another."[5] But I venture to think that the absurdity is the other way, and that there is no need of any more complex machinery in such a case than where the agent is a mere

[1] Sampson *v.* Cranfield, 1 Bulstr. 157 (T. 9 Jac.).

[2] In Tort: Y. B. 32 Ed. I. 318, 320 (Harwood); 22 Ass. pl. 43, fol. 94; 11 H. IV. 90, pl. 47; 9 H. VI. 53, pl. 37; 21 H. VI. 39; 4 Ed. IV. 36; Dr. & Stud., II. c. 42; Seaman & Browning's Case, 4 Leon. 123, pl. 249 (M. 31 Eliz.). Conveyance: Fitz. Abr. *Annuitie*, pl. 51 (H. 33 Ed. I.), where the maxim is quoted. Account: 4 Inst. 109.

[3] Gregory *v.* Piper, 9 B. & C. 591. Cf. The Common Law, 53, 54, and Lect. 3 and 4.

[4] Bower *v.* Peate, 1 Q. B. D. 321.

[5] Thöl, Handelsrecht, sect. 70, cited in Wharton, Agency, sect. 6.

messenger to express terms settled by his principal in every detail. Suppose that the principal agrees to buy a horse at a price to be fixed by another. The principal makes the contract, not the referee who settles the price. If the agreement is communicated by messenger, it makes no difference. If the messenger is himself the referee, the case is still the same. But that is the case of an agent with discretionary powers, no matter how large they may be. So far as he expresses his principal's assent to be bound to terms to be fixed by the agent, he is a mere messenger; in fixing the terms he is a stranger to the contract, which stands on the same footing as if it had been made before his personal function began. The agent is simply a voice affording the marks provided by the principal's own expression of what he undertakes. Suppose a wager determined in amount as well as event by the spinning of a teetotum, and to be off if numbers are turned up outside certain limits; is it the contract of the teetotum?

If agency is a proper title of our *corpus juris*, its peculiarities must be sought in doctrines that go farther than any yet mentioned. Such doctrines are to be found in each of the great departments of the law. In tort, masters are held answerable for conduct on the part of their servants, which they not only have not authorized, but have forbidden. In contract, an undisclosed principal may bind or may be bound to another, who did not know of his very existence at the time he made the contract. By a few words of ratification a man may make a trespass or a contract his own in which he had no part in fact. The possession of a tangible object may be attributed to him although he never saw it, and may be denied to another who has it under his actual custody or control. The existence of these rules is what makes agency a proper title in the law.

I do not mean to assume in advance that these rules have a common origin because they are clustered round the same subject. It would be possible to suggest separate reasons for each, and going farther still, to argue that each was no more than an application, even though a misapplication, of general principles.

Thus, in torts it is sometimes said that the liability of the master is "in effect for employing a careless servant," repeating the reason offered by the pseudo-philosophy of the Roman jurists for an exceptional rule introduced by the prætor on grounds of public policy.[1] This reason is shown to be unsound by the single fact that no amount of care in selection will exonerate the master;[2] but still it might be argued that, whether right or wrong, this or some other notion of policy had led to the first of the rules which I selected as peculiar, and that at most the liability of a master for his servant's torts is only a mistaken conclusion from the general theory of tort.

Then with regard to undisclosed principals in contract, it might be said that it was no hardship to hold a man bound who had commanded his servant to bind him. And as to the other and more difficult half of the doctrine, the right of an undisclosed principal to sue, it might be observed that it was first asserted in cases of debt,[3] where the principal's goods were the consideration of the liability, and that the notion thus started was afterwards extended to other cases of simple contract. Whether the objections to the analogy and to the whole rule were duly considered or not, it might be urged, there is no connection other than a purely dramatic one between the law of agency in torts and in contracts, or between the fact of agency and the rule, and here, as there, nothing more is to be found than a possibly wrong conclusion from the general postulates of the department of law concerned.

Ratification, again, as admitted by us, the argument would continue, merely shows that the Roman maxim "*ratihabitio mandato comparatur*" has become imbedded in our law, as it has been from the time of Bracton.

Finally, the theory of possession through servants would be accounted for by the servant's admission of his master's present right to deal with the thing at will, and the absence

[1] Parke, B., in Sharrod *v.* London & N. W. Ry. Co., 4 Exch. 580, 585 (1849); 1 Austin, Jurisprudence, Lect. 26, 3d ed., p. 513. Cf. The Common Law, 15, 16.

[2] Dansey *v.* Richardson, 3 El. & Bl. 144, 161.

[3] Scrimshire *v.* Alderton, 2 Strange, 1182 (H. 16 G. II). Cf. Gurratt *v.* Mullum (T. 9 Anne, B. R.), stated in Scott *v.* Surman, Willes, 400, at 406 (H. 16 G. II.), and in Buller, N. P. 42.

of any claim or intent to assert a claim on his part, coupled with the presence of such a claim on the part of the master.

But the foregoing reasoning is wholly inadequate to justify the various doctrines mentioned, as I have shown in part and as I shall prove in detail hereafter. And assuming the inadequacy to be proved, it cannot but strike one as strange that there should run through all branches of the law a tendency to err in the same direction. If, as soon as the relation of master and servant comes in, we find the limits of liability for, or gain by, others' acts enlarged beyond the scope of the reasons offered or of any general theory, we not only have good ground for treating that relation separately, but we fairly may suspect that it is a cause as well as a concomitant of the observed effects.

Looking at the whole matter analytically it is easy to see that if the law did identify agents with principals, so far as that identification was carried the principal would have the burden and the benefit of his agent's torts, contracts, or possession. So, framing a historical hypothesis, if the starting-point of the modern law is the *patria potestas*, a little study will show that the fiction of identity is the natural growth from such a germ.

There is an antecedent probability that the *patria potestas* has exerted an influence at least upon existing rules. I have endeavored to prove elsewhere that the unlimited liability of an owner for the torts of his slave grew out of what had been merely a privilege of buying him off from a surrender to the vengeance of the offended party, in both the early Roman and the early German law. I have shown, also, how the unlimited liability thus established was extended by the prætor in certain cases to the misconduct of free servants.[1] Of course it is unlikely that the doctrines of our two parent systems should have been without effect upon their offspring, the common law.

The Roman law, it is true, developed no such universal doctrines of agency as have been worked out in England. Only innkeepers and shipowners (*nautae, caupones, stabularii*) were made answerable for the misconduct of their free

[1] The Common Law. 9, 15-20.

servants by the prætor's edict. It was not generally possible to acquire rights or to incur obligations through the acts of free persons.[1] But, so far as rights of property, possession,[2] or contract[3] could be acquired through others not slaves, the law undoubtedly started from slavery and the *patria potestas.*

It will be easy to see how this tended toward a fictitious identification of agent with principal, although within the limits to which it confined agency the Roman law had little need and made little use of the fiction. Ulpian says that the act of the family cannot be called the act of the *paterfamilias* unless it is done by his wish.[4] But as all the family rights and obligations were simply attributes of the *persona* of the family head, the summary expression for the members of the family as means of loss or gain would be that they sustained that *persona, pro hac vice.* For that purpose they were one with the *paterfamilias.* Justinian's Institutes tell us that the right of a slave to receive a binding promise is derived *ex persona domini.*[5] And with regard to free agents, the commentators said that in such instances two persons were feigned to be one.[6]

Such a formula, of course, is only derivative. The fiction is merely a convenient way of expressing rules which were arrived at on other grounds. The Roman prætor did not make innkeepers answerable for their servants because "the act of the servant was the act of the master," any more than because they had been negligent in choosing them. He did so on substantive grounds of policy — because of the special confidence necessarily reposed in innkeepers. So when it was held that a slave's possession was his owner's possession, the practical fact of the master's power was at the bottom of the decision.[7]

But when such a formula is adopted, it soon acquires an

[1] Inst. 2, 9, § 5; D. 44, 7, 11; D. 45, 1. 126, § 2.
[2] Inst. 2, 9, esp. §§ 4, 5. Cf. D. 41, 1, 53.
[3] Inst. 3, 17; D. 41, 1, 53; D. 45, 1, 38, § 17.
[4] D. 43, 16, 1, §§ 11-13.
[5] Inst. 3, 17, pr. 18, in the older editions.
[6] D. 45, 1, 38, § 17, Elzevir ed. Gothofred. note 74. Cf. D. 44, 2, 4, note 17.
[7] The Common Law, 228.

independent standing of its own. Instead of remaining only a short way of saying that when from policy the law makes a master responsible for his servant, or because of his power gives him the benefit of his slave's possession or contract, it treats him *to that extent* as the tort-feasor, possessor, or contractee, the formula becomes a reason in itself for making the master answerable and for giving him rights. If "the act of the servant is the act of the master," or master and servant are "considered as one person," then the master must pay for the act if it is wrongful, and has the advantage of it if it is right. And the mere habit of using these phrases, where the master is bound or benefited by his servant's act, makes it likely that other cases will be brought within the penumbra of the same thought on no more substantial ground than the way of thinking which the words have brought about.

I shall examine successively the English authorities with regard to agency in tort, contract, ratification, and possession. But some of those authorities are of equal importance to every branch of the proposed examination, and will prove in advance that the foregoing remarks are not merely hypothetical. I therefore begin with citations sufficient to establish that family headship was recognized as a factor in legal rights and duties; that this notion of headship was extended by analogy so as to cover the relation of a master to freemen filling a servile place for the time being, and that the relations thus embraced were generalized under the misleading fiction of identity.

The *familia*, Bracton says, embraces "those who are regarded in the light of serfs, such as, &c. So, too, as well freemen as serfs, and those over whom one has the power of command." [1]

In West's Symboleography,[2] a work which was published towards the beginning of the reign of James I., and which, though mainly a form book, gives several glimpses of far-reaching insight, we read as follows: —

[1] "Et etiam familiae appellatio eos complectitur qui loco servorum habentur, sicut sunt mercenarii et conductitii. Item tam liberi quam servi, et quibus poterit imperari." Bract., fol. 171 *b*.

[2] Lib. I., Sect. 3, *ad fin.* "Of the Fact of Man."

"The person is he which either agreeth or offendeth, and beside him none other.

"And both may be bound either mediately, or immediately.

"Immediately, if he which is bound doe agree.

"Mediately, when if he, which by nature differeth from him, but not by law, whereby as by some bond he is fained to be all one person, doth contract, or offend, of which sort in some cases be those which be in our power, as a wife, a bondman, servant, a factor, an Attourney, or Procurator, exceeding their authority."

Here we see that the *patria potestas* is the substantive ground, that it is extended to cover free agents, who are not even domestic servants, and that it finds its normal expression in the fiction of identity.

So, at the beginning of the next reign, it was said that an action for hire, due to the negligence of a wife, or servant, lay "*vers patrem familias.*"[1] The extension of the liability, as shown by West, is sometimes expressed in later books by saying that it is not confined to cases where the party stands in the relation of *paterfamilias* to the wrong-doer;[2] but this only means that the rule extends to other servants besides domestic servants, and admits the analogy or starting-point.[3]

Every one is familiar with the fiction as applied to married women. The early law dealt with married women on the footing of servants. It called both wives and servants chattels.[4] The wife was said to be in the nature of a servant,[5] and husband and wife were only one person in law.[6] So far was this identification carried, so far was the *persona* of the wife swallowed up in and made part of her husband's, that whereas, in general, assigns could not vouch upon a warranty unless they were expressly mentioned in it,[7] a husband could always vouch upon a warranty made to his wife before mar-

[1] Shelley & Barr's Case, 1 Roll. Abr. 2, pl. 7 (M. 1 Car. I.).

[2] Bac. Abr., *Master and Servant,* K.; Smith's Master & Servant, 3d ed., 260.

[3] Laugher *v.* Pointer, 5 B. & C. 547, 554 (1826). Cf. Bush *v.* Steinman, 1 Bos. & P. 404 (1799).

[4] Y. B. 19 H. VI. 31, pl. 59; 2 Roll. Abr. 546 (D).

[5] 1 Roll. Abr. 2, pl. 7.

[6] Dial. de Scaccario II., c. 18; Bract., fol. 429 *b;* Y. B. 22 H. VI. 38, pl. 6; Litt. §§ 168, 191; 3 Salk. 46; Com. Dig. *Baron & Feme* (D); 1 Bl. Comm. 442.

[7] The Common Law, 375, n. 2, 401, n. 1.

riage. By marriage, as was said in Simon Simeon's case "it vested in the person of the husband." That is to say, although what actually happened was that the right to enforce a contract was transferred to a stranger, in theory of law there was no transfer, because the stranger had become the same person as the contractee.[1]

Of course the identification between husband and wife, although by no means absolute, was far more complete than that between master and menial servant, just as in the latter case it went farther than in that of an agent employed for some particular transaction. Even in the case of villeins, while the lord might take advantage of their possession or their title, he could not take advantage of contracts or warranties made to them.[2] But the idea and its historical starting-point were the same throughout. When considering the later cases, the reader will remember that it is incontrovertibly established that a wife was on the footing of a servant, that the consequences of the relation were familiarly expressed in terms of the fiction of identity, and, therefore, that the applicability of this fiction to the domestic relations generally must have been well known to the courts long before the date of the principal decisions, which it will be my task to interpret.

I now take up the liability of a master for the torts of his servant at common law. This has been supposed in England to have been manufactured out of the whole cloth, and introduced by the decision in Michael *v.* Alestree[3] in the reign of Charles II. In view of the historical antecedents it would be very extraordinary if such a notion was correct. I venture to think that it is mistaken, and that the principle has gradually grown to its present form from beginnings of the earliest date. I also doubt whether Michael *v.* Alestree is an example

[1] Simon Simeon's Case, Y. B. 30 Ed. III. 14; s. c. ib. 6; 29 Ed. III. 48. I have seen no reason to change the views expressed in The Common Law, Lecture XI., to meet the suggestions of Prof. Ames in 3 Harv. Law Rev. 388, n. 6. Undoubtedly the letter of credit was known in the reign of Henry III. 1 Royal Letters, Hen. III. 315. But the modern theory of contract applied to letters of credit, in my opinion, was not the theory on which assigns got the benefit of a warranty. Norcross *v.* James, 140 Mass. 188.

[2] Y. B. 22, Ass. pl. 27, fol. 93; Co. Lit. 117 *a*.

[3] 2 Levinz, 172; s. c. 3 Keble, 650, 1 Ventris, 295 (T. 28 Car. II.).

for the principle in question. It rather seems to me a case in which the damage complained of was the natural consequence of the very acts commanded by the master, and which, therefore, as I have said above, needs no special or peculiar doctrine to account for it. It was an action on the case against master and servant;

"for that the Defendants in *Lincoln's-Inn Fields*, a Place where People are always going to and fro about their Business, brought a Coach with two ungovernable Horses, *& eux improvide incaute & absque debita consideratione ineptitudinis loci* there drove them to make them tractable and fit them for a Coach; and the Horses, because of their Ferocity, being not to be managed, ran upon the Plaintiff, and ** wounded him: The master was absent," but both defendants were found guilty. "It was moved in Arrest of Judgment, That no *Sciens* is here laid of the Horses being unruly, nor any Negligence alledged, but *e contra*, That the Horses were ungovernable: Yet judgment was given for the Plaintiff, for it is alledged that it was *improvide & absque debita consideratione ineptitudinis loci;* and it shall be intended the Master Sent the servant to train the Horses there."[1]

In other words, although there was no negligence averred in the mode of driving the horses at the instant of the accident, but, *e contra*, that the horses were ungovernable, which was the scope of the defendant's objection, there was negligence in driving ungovernable horses for the purpose of breaking them in a public place, and that was averred, and was averred to have been done negligently. Furthermore, it was averred to have been done negligently by the defendant, which was a sufficient allegation on its face, and would be supported by proof that the defendant, knowing the character of the horses, ordered his servant to break them in a public resort. Indeed, the very character of the command (to break horses) imports sufficient knowledge; and when a command is given to do the specified act complained of, it always may be laid as the act of the party giving the order.[2]

When I come to investigate the true history of this part of the law, notwithstanding the likelihood which I have pointed out that it was a continuation and development of what I

[1] 2 Lev. 172.
[2] *Sup.*, p. 346, n.

have traced in one or both of the parent systems, I must admit that I am met with a difficulty. Even in Bracton, who writes under the full influence of the Roman law, I have failed to find any passage which distinctly asserts the civil liability of masters for their servants' torts, apart from command or ratification. There is one text, to be sure, which seems corrupt as it stands and which could be amended by conjecture so as to assert it. But as the best manuscripts in Lincoln's Inn substantially confirm the printed reading, conjecture would be out of place.[1]

On the other hand, I do find an institution which may or may not have been connected with the Anglo-Saxon laws touching the responsibility of masters, but which, at any rate, equally connects liability of a different sort with family headship.

At about the time of the Conquest, what was known as the *Frithborh*, or frankpledge, was either introduced or grew greatly in importance. Among other things, the master was made the pledge of his servants, to hand them over to justice or to pay the fine himself. "Omnes qui servientes habent, eorum sint francplegii," was the requirement of William's laws. Bracton quotes the similar provisions of Edward the Confessor, and also says that in some counties a man is held to answer for the members of his family.[2] This quasi-criminal liability of master for man is found as late as Edward II. alongside of the other rules of frankpledge, with which this discussion is not concerned. Fitzherbert's Abridgment[3] reads as follows: "Note that if the servant (*serviens*) of any lord while in his service (*in servicio suo existens*) commits a felony and is convicted, although after the felony (the master) has not received him, he is to be amerced, and the reason is because he received him 'in bourgh.'" Bracton, in like manner, says that the master is bound "*emendare*" for certain torts of his servant,[4] meaning, as I take it, to pay a fine, not damages.

[1] Bract., fol. 115 *a*.

[2] "Tenebitur ille, in quibusdam partibus, de cujus fuerint familia et manupastu." Bract., fol. 124 *b*; *i. e.*, for the persons under his *patria potestas*. LL. Gul. I. c. 52; LL. Edw. Conf. c. 21 (al. 20).

[3] *Corone*, pl. 428 (8 Ed. II. It. canc.).

[4] Bract., fol. 158 *b*, 171 *a*, *b*, 172 *b*. Cf. Ducange, "*Emenda*."

But true examples of the peculiar law of master and servant are to be found before Edward II. The maxim *respondeat superior* has been applied to the torts of inferior officers from the time of Edward I. to the present day. Thus that chapter of the Statute of Westminster the Second,[1] which regulates distresses by sheriffs or bailiffs, makes the officer disregarding its provisions answerable, and then continues, "*si non habeat ballivus unde reddat reddat superior suus.*" So a later chapter of the same statute, after subjecting keepers of jails to an action of debt for escapes in certain cases, provides that if the keeper is not able to pay, his superior, who committed the custody of the jail to him, shall be answerable by the same writ.[2] So, again, the eighteenth chapter of the Articuli super Chartas[3] gives a writ of waste to wards, for waste done in their lands in the king's hands by escheators or sub-escheators, "against the escheator for his act, or the sub-escheator for his act (if he have whereof to answer), and if he have not, his master shall answer ('*si respoigne son sovereign*') by like pain concerning the damages, as is ordained by the statute for them that do waste in wardships." A case of the time of Edward II. interpreting the above statute concerning jailers is given in Fitzherbert's Abridgment,[4] and later similar cases are referred to in Coke's Fourth Institute.[5]

It may be objected that the foregoing cases are all statutory. But the same principle seems to have been applied, apart from any statute except that which gave counties the power to elect coroners, to make the county of Kent answerable to the king for a coroner's default, as well as in other instances which will be mentioned later.[6] Moreover, early

[1] St. 13 Ed. I., St. I, c. 2, § 3.

[2] c. 11, *ad finem*. "Et si custos gaole non habeat per quod justicietur vel unde solvat *respondeat superior* suus qui custodiam hujusmodi gaole sibi commisit per idem breve."

[3] St. 28 Ed. I., c. 18.

[4] *Dette*, pl. 172 (M. 11 Ed. II.).

[5] 4 Inst. 114; "45 E. 3, 9, 10. *Prior datife et removeable suffer eschape, respondeat superior.* 14 E. 4. *Pur insufficiency del bailie dun libertie respondeat dominus libertatis.* Vid. 44 E. 3, 13; 50 E. 3, 5; 14 H. 4, 22; 11 H. 6, 52; 30 H. 6, 32."

[6] See the writ of H. 14 Ed. III. ex parte Remem. Regis, rot. 9, in Scacc. in 4 Inst. 114, and less fully in 2 Inst. 175. "Et quia ipse coronator electus erat per comitatum juxta formam statuti, etc. ita quod in

statutes are as good evidence of prevailing legal conceptions as decisions are.

But again it may be objected that there were special grounds of public policy for requiring those who disposed of public offices of profit to appoint persons "for whom they will answer at their peril," in the words of another similar statute as to clerks in the King's Courts.[1] It might be said with truth that the responsibility was greater than in the case of private servants, and it might be asked whether *respondeat superior* in its strict sense is not an independent principle which is rather to be deemed one of the causes of the modern law, than a branch from a common stem. It certainly has furnished us with one of the inadequate reasons which have been put forward for the law as it is, — that somebody must be held who is able to pay the damages.

The weight of the evidence seems to me to overcome these objections. I think it most probable that the liability for under-officers was a special application of conceptions drawn from the family and the power of the family head over his servants. Those conceptions were in existence, as I have shown. From a very early date, under-officers are called servants of their superior, as indeed it seems to be implied that they are, by the word "*sovereign*," or even "*superior*," in the statutes which have been cited. "Sovereign" is used as synonymous with master in Dyer.[2] In the Y. B., 11 Edward IV. 1, pl. 1, it is said, "If I make a deputy, I am always officer, and he performs the office in my right and as my servant;" and from that day to this, not only has the same language been repeated,[3] but, as I shall show, one of the chosen fields for the express use of the fiction of identity is the relation of superior and under-officer.

Under Edward III. it was held that if an abbot has a ward-

defectu ejusdem coronatoris totus comitatus ut elector et superior, etc. (tenetur), habeant regi respondere, praecip (praeceptum fuit) nunc vic' quod de terris et tenementis (hominum) hujusmodi totius comitatus in balliva sua fieri fac." etc. See the other references in 4 Inst. 114, and further Y. B. 49 Ed. III. 25, 26, pl. 3.

[1] St. 2 H. VI., c. 10.

[2] Alford *v.* Eglisfield, Dyer, 230 *b*, pl. 56. The passage will be cited later in dealing with factors. See also Y. B. 27 H. VIII. 24, pl. 3.

[3] Parkes *v.* Mosse, Cro. Eliz. 181 (E. 32 Eliz.); Wheteley *v.* Stone, 2 Roll. Abr. 556, pl. 14; s. c. Hobart, 180; 1 Bl. Comm. 345, 346.

ship, and a co-canon commits waste, the abbot shall be charged by it, "for that is adjudged the deed of the abbot." [1] This expression appears to me not only to apply the rule *respondeat superior* beyond the case of public officers, but to adopt the fiction of identity as a mode of explaining the rule.

An earlier record of the same reign, although it turned on the laws of Oleron, shows that the King's Court would in some cases hold masters more strictly accountable for their servants' torts than is even now the case. A ship-master was held liable in trespass *de bonis asportatis* for goods wrongfully taken by the mariners, and it was said that he was answerable for all trespasses on board his ship.[2]

A nearly contemporaneous statute is worth mentioning, although it perhaps is to be construed as referring to the fines which have been mentioned above, or to other forfeitures, and not to civil damages. It reads, "That no merchant nor other, of what condition that he be, shall lose or forfeit his goods nor merchandizes for the trespass and forfeiture of his servant, unless he do it by the commandment or procurement of his master, or that he hath offended in the office in which his master hath set him, or in other manner, that the master be holden to answer for the deed of his servant by the law-merchant, as elsewhere is used." [3] The statute limits a previously existing liability, but leaves it open that the master still shall be holden to answer for the deed of his servant in certain cases, including those of the servant's offending in the office in which the master hath set him. It is dealing with merchants, to be sure, but is another evidence that the whole modern law is of ancient extraction.

It must be remembered, however, that the cases in which the modern doctrines could have been applied in the time of the Year Books were exceedingly few. The torts dealt with by the early law were almost invariably wilful. They were either prompted by actual malevolence, or at least were com-

[1] Y. B. 49 Ed. III. 25, 26, pl. 3.
[2] Brevia Regis in Turr. London, T. 24 Ed. III., No. 45, Bristol, printed in Molloy, Book 2, ch. 3, § 16.
[3] St. 27 Ed. III., St. 2, cap. 19.

mitted with full foresight of the ensuing damage.[1] And as the judges from an early day were familiar with the distinction between acts done by a man on his own behalf and those done in the capacity of servant,[2] it is obvious that they could not have held masters generally answerable for such torts unless they were prepared to go much beyond the point at which their successors have stopped.[3] Apart from frauds[4] and intentional trespasses against the master's will[5] I only know of one other case in the Year Books which is important to this part of my subject. That, however, is very important. It is the case concerning fire,[6] which was the precedent relied on by Lord Holt in deciding Turberville *v.* Stampe,[7] which in its turn has been the starting-point of the later decisions on master and servant.[8] I therefore shall state it at length.

Beaulieu sued Finglam, alleging that the defendant so negligently guarded his fire that for want of due guard of the same the plaintiff's houses and goods were burned. Markham [J.], A man is held to answer for the act of his servant or of his guest (*hosteller*) in such case; for if my servant or my guest puts a candle on a beam, (*en un pariet,*) and the candle falls in the straw, and burns all my house, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage which he has, *quod concedebatur per curiam.* Horneby [of counsel], Then he should have had a writ, *Quare domum suam ardebat vel exarsit.* Hull [of counsel], That will be against all reason to put blame or default in a man where there is (*il ad*) none

[1] The Common Law, 3, 4, 101-103. I do not mean as a matter of articulate theory, but as a natural result of the condition of things. As to very early principles of liability see now Dr. Brunner's most learned and able discussion in Sitzungsberichte der kön. Preuss. Akademie der Wissensch. xxxv., July 10, 1890, über absichtlose Missethat im Altdeutschen Strafrechte. [Abstracted in Essay No. 66 of this Collection. — Eds.] Some of the cases mentioned by him, such as Beowulf, 2435, had come to my notice.

[2] See, *e. g.*, Gascoigne in Y. B. 7 H. IV. 34, 35, pl. 1.

[3] Cf. Dr. & Stud. Dial. 2, c. 42 (A. D. 1530).

[4] Y. B. 9 H. VI. 53, pl. 37.

[5] Y. B. 13 H. VII. 15, pl. 10. Cf. Keilway, 3 *b*, pl. 7 (M. 12 H. VII.).

[6] Y. B. 2 H. IV. 18, pl. 6.

[7] Carthew, 425, shows that the Year Book was cited. And the language of Lord Holt, reported in 1 Ld. Raym. 264, shows that he had it before his mind.

[8] Brucker *v.* Fromont, 6 T. R. 659; M'Manus *v.* Crickett, 1 East, 106; Patten *v.* Rea, 2 C. B. N. S. 606.

in him; for negligence of his servants cannot be called his feasance. Thirning [C. J.], If a man kills (*tue ou occist*) a man by misfortune he will forfeit his goods, and he must have his charter of pardon *de grace*. *Ad quod Curia concordat.* Markham, I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained (*hoste*) by me or by my servant, if he does, or any one of them does such a thing, as with a candle (*come de chandel*), or other thing, by which feasance the house of my neighbor is burned; but if a man from outside my house, against my will, puts the fire in the straw of my house, or elsewhere, by which my house is burned and also the houses of my neighbor are burned, for that I shall not be held to answer to them, etc., for this cannot be said to be through ill-doing (*male*) on my part, but against my will." Horneby then said that the defendant would be ruined if this action were maintained against him. "Thirning [C. J.], What is that to us? It is better that he should be undone wholly, than that the law should be changed for him." [1] Then they were at issue that the plaintiff's house was not burned by the defendant's fire.

The foregoing case affords some ground for the argument which was vainly pressed in Turberville *v.* Stampe, that the liability was confined to the house.[2] Such a limit is not unsupported by analogy. By the old law a servant's custody of his master's things was said to be the master's possession within his house, but the servant's on a journey outside of it.[3] So an innkeeper was liable for all goods within the inn, whether he had the custody of them or not.[4] So in the case which has been mentioned above, a master was said to be responsible for the acts of his servants on board ship. It will be noticed also that the responsibility of a householder seems to be extended to his guests. From that day to this there have been occasional glimpses of a tendency to regard guests as part of the *familia* for the purposes of the law.[5] And in view of the fact that by earlier law if a guest was allowed to stop in the house three days, he was called *hoghenehine* or *agenhine*, that is, *own hine* or servant of the host, it may be thought that we have here an

[1] Y. B. 2 H. IV. 18, pl. 6.
[2] See also 1 Bl. Comm. 431; Noy's Maxims, c. 44.
[3] Y. B. 21 H. VII. 14, pl. 21; The Common Law, 226.
[4] Y. B. 42 Ass., pl. 17, fol. 260; 42 Ed. III. 11, pl. 13.
[5] Y. B. 13 Ed. IV. 10, pl. 5; Southcote *v.* Stanley, 1 H. & N. 247, 250.

echo of the *frithborh*.[1] But with whatever limits and for whatever occult causes, the responsibility of the head of the house for his servants was clearly recognized, and, it would seem, the identification of the two, notwithstanding a statement by counsel, as clear as ever has been made since, of the objections to the doctrine.

The later cases in the Year Books are of wilful wrongs, as I have said, and I now pass to the subsequent reports. Under Elizabeth a defendant justified taking sheep for toll under a usage to have toll of strangers' sheep driven through the vill by strangers, and if he were denied by such stranger driving them, to distrain them. The defendant alleged that the plaintiff, the owner of the sheep, was a stranger, but did not allege that the driver was. But the court sustained the plea, saying, "The driving of the servant is the driving of the master; and if he be a foreigner, that sufficeth."[2]

I leave on one side certain cases which often have been cited for the proposition that a master is chargeable for his servant's torts, because they may be explained otherwise and make no mention of it.[3]

[1] Bract., fol. 124 *b*; LL. Gul. I., c. 48; LL. Edw. Conf., c. 23.

To the above illustrations of a man's responsibility within his house, add that of a vassal for attempts on the chastity of his lord's daughter or sister "tant com elle est Damoiselle en son Hostel," in Ass. Jerusalem, ch. 205, 217, ed. 1690. The origin of the liability of innkeepers never has been studied, so far as I know. Beaumanoir, c. 36, seems to confine the liability to things intrusted to the innkeeper, and to limit it somewhat even in that case, and to suggest grounds of policy. The English law was more severe, and put it on the ground that the guest for the time had come to be under the innkeeper's protection and safety. 42 Ass., pl. 17, fol. 260. A *capias* was refused on the ground that the defendant was not in fault, but an *elegit* was granted. 42 Ed. III. 11, pl. 13. Notwithstanding the foregoing reason given for it, the liability was confined, at an early date, to those exercising a common calling (*common hostler*). 11 Hen. IV. 45, pl. 18. See The Common Law, 183-189, 203. See further, 22 Hen. VI. 21, pl. 38; ib. 38, pl. 8. And note a limitation of liability in cases of taking by the king's enemies, similar to that of bailees. Plowden, 9, and note in margin; The Common Law, 177, 182, 199, 201. The references to the custom of England, or to the *lex terræ*, are of no significance. The Common Law, 188. See further, the titles of Glanville and Bracton. Other citations could be given if necessary.

[2] Smith *v.* Shepherd, Cro. Eliz., 710; M. 41 & 42 Eliz. B. R.

[3] The most important is Lord North's case, Dyer, 161 *a* (T. 4 & 5 Phil. & M.); but there the master was a bailee bound to return at his peril (cf. The Common Law, 175-179). In Dyer, 238 *b*, pl. 38 (E. 7 Eliz.), a customer of a port was said to be liable to the penalties for a false return, although he made it through the concealment of his

The next evidence of the law to which I refer is the passage from West's Symboleography which was given in full at the outset, and which gives the modern doctrine of agency as well as the fiction of identity in their full development. There are two nearly contemporaneous cases in which unsuccessful attempts were made to hold masters liable for wilful wrongs of their servants, in one for a piracy,[1] in the other for a fraud.[2] They are interesting chiefly as showing that the doctrine under discussion was in the air, but that its limits were not definitely fixed. The former sought to carry the rule *respondeat superior* to the full extent of the early statutes and cases which have been referred to, and cited the Roman law for its application to public affairs. The latter cites Doctor and Student. West also, it will have been noticed, indicates Roman influence.

Omitting one or two cases on the liability of the servant, which will be mentioned shortly, I come once more to a line of authorities touching public officers. I have said that although there was a difference in the degree of responsibility, under-officers always have been said to be servants.

Under Charles II. this difference was recognized, but it was laid down that "the high sheriff and under-sheriff is one officer," and on that ground the sheriff was held chargeable.[3] Lord Holt expressed the same thought: "What is done by the deputy is done by the principal, and it is the act of the principal," or, as it is put in the margin of the report, "Act of deputy may forfeit office of principal, because it is *quasi* his act."[4] Later still, Blackstone repeats from the bench the language of Charles's day. "There is a difference between master and servant, but a sheriff and all his officers are considered in cases like this as one person." So his associate judge, Gould, "I consider [the

deputy. One or both of these cases are cited in Waltham *v.* Mulgar, Moore, 776; Southern *v.* How, Popham, 143; Boson *v.* Sandford, 1 Shower, 101; Lane *v.* Cotton, 12 Mod. 472, 489, etc.

[1] Waltham *v.* Mulgar, Moore 776 (P. 3 Jac. I.).

[2] Southern *v.* How, Cro. Jac. 468; s. c. Popham, 143; 2 Roll. Rep. 5, 26; Bridgman, 125, where the special verdict is set forth.

[3] Cremer *v.* Humberston, 2 Keble, 352 (H. 19 & 20 Car. II.).

[4] Lane *v.* Cotton, 1 Salk. 17, 18; s. c. 1 Ld. Raym. 646, Com. 100 (P. 12 W. III.).

under-sheriff's clerk] as standing in the place of, and representing the very persons of . . . the sheriffs themselves."[1] Again, the same idea is stated by Lord Mansfield: "For all civil purposes the act of the sheriff's bailiff is the act of the sheriff."[2] The distinction taken above by Blackstone did not prevent his saying in his Commentaries that under-officers are servants of the sheriff;[3] and in Woodgate *v.* Knatchbull,[4] Ashurst, J., after citing the words of Lord Mansfield, adds, "This holds, indeed, in most instances with regard to servants in general;" and Blackstone says the same thing in a passage to be quoted hereafter.

Having thus followed down the fiction of identity with regard to one class of servants, I must now return once more to Lord Holt's time. In Boson *v.* Sandford,[5] Eyres, J., says that the master of a ship is no more than a servant, "the power which he hath is by the civil law, Hob. 111, and it is plain the act or default of the servant shall charge the owner." Again, in Turberville *v.* Stampe,[6] Lord Holt, after beginning according to the Roman law that "if my servant throws dirt into the highway I am indictable," continues, "So in this case, if the defendant's servant kindled the fire in the way of husbandry and proper for his employment, though he had no express command of his master, yet the master shall be liable to an action for damages done to another by the fire; for it shall be intended, that the servant had authority from his master, it being for his master's benefit." This is the first of a series of cases decided by Lord Holt[7] which are the usual starting-point of modern decisions, and it will be found to be the chief authority relied on by cases which have become leading in their turn.[8] It there-

[1] Saunderson *v.* Baker, 3 Wilson, 309 s. c. 2 Wm. Bl. 832; (T. 12 G. III. 1772).
[2] Ackworth *v.* Kempe, Douglas, 40, 42 (M. 19 G. III. 1778).
[3] 1 Bl. Comm. 345, 346.
[4] 2 T. R. 148, 154 (1787).
[5] 1 Shower, 101, 107 (M. 2 W. III.).
[6] 1 Ld. Raym. 264 (M. 9 W. III.); s. c. 3 id. 250, Carthew, 425, Com. 32, 1 Salk. 13, Skinner, 681, 12 Mod. 151, Comb. 459, Holt, 9.
[7] Jones *v.* Hart, 2 Salk. 441; s. c. 1 Ld. Raym. 738, 739 (M. 10 W. III.); Middleton *v.* Fowler, 1 Salk. 282 (M. 10 W. III.); Hern *v.* Nichols, 1 Salk. 289.
[8] Brucker *v.* Fromont, 6 T. R. 659; M'Manus *v.* Crickett, 1 East, 106; Patten *v.* Rea, 2 C. B. N. S. 606 (1857).

fore is interesting to note that it only applied the principles of Beaulieu *v.* Finglam, in the Year Book 2 Henry IV., to a fire outside the house, that the illustration taken from the Roman law shows that Lord Holt was thinking of the responsibility of a *paterfamilias*, and that in another case within three years [1] he made use of the fiction of identity.

I may add, by way of confirmation, that Blackstone, in his Commentaries, after comparing the liability of the master who "hath the superintendence and charge of all his household" if any of his family cast anything out of his house into the street, with that of the Roman *paterfamilias*,[2] further observes that the "master may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself."[3]

There is another line of cases which affords striking and independent evidence that the law of master and servant is a survival from slavery or other institution of like effect for the present purpose, and that the identification of the two parties was carried out in some cases to its logical result. If a servant, although a freeman, was treated for the purposes of the relation as if he were a slave who only sustained the *persona* of his master, it followed that when the master was liable, the servant was not. There seems to have been a willingness at one time to accept the conclusion. It was said under James and Charles I. that the sheriff only was liable if an under-sheriff made a false return, "for the law doth not take notice of him."[4] So it was held in the latter reign that case does not lie against husband and wife for negligently keeping their fire in their house, "because this action lies on the . . . custom . . . against *patrem familias* and not against a servant or a *feme covert* who is in the

[1] Lane *v.* Cotton, 1 Salk. 17, 18.
[2] See also Noy's Maxims, c. 44.
[3] Bl. Comm. 431, 432.
[4] Cremer & Tookley's Case, Godbolt, 385, 389 (Jac. I.); Laicock's Case, Latch, 187 (H. 2 Car. I.).

nature of a servant.[1] So Rolle says that "if the servant of an innkeeper sells wine which is corrupt, knowing this, action of deceit lies not against the servant, for he did this only as servant."[2] So as to an attorney maliciously acting in a case where he knew there was no cause of action. "For that what he does is only as servant to another, and in the way of his calling and profession."[3]

Later this was cut down by Lord Holt to this rule that a servant is not liable for a neglect (*i. e.*, a nonfeasance), "for they must consider him only as a servant;" "but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrong-doer."[4] That is to say, although it is contrary to theory to allow a servant to be sued for conduct in his capacity as such, he cannot rid himself of his responsibility as a freeman, and may be sued as a free wrong-doer. This, of course, is the law to-day.[5] Yet as late as Blackstone's Commentaries it was said that "if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant.[6]

I think I now have traced sufficiently the history of agency in torts. The evidence satisfies me that the common law has started from the *patria potestas* and the *frithborh*, — whether following or simply helped by the Roman law, it does not matter, — and that it has worked itself out to its limits through the formula of identity. It is true that liability for another as master or principal is not confined to family relations; but I have shown partly, and shall complete the proof later, that the whole doctrine has been worked

[1] Shelley & Burr, 1 Roll. Abr. 2, pl. 7 (M. 1 Car. I.). Cf. 1 Bl. Comm. 431; Com. Dig., *Action on the case for negligence*, A. C.

[2] Roll. Abr. 95 (T.), citing no authority, and adding, "*Contra*, 9 Hen. VI. 53 *b*." The contradiction is doubtful.

[3] Anon., 1 Mod. 209, 210 (H. 27 & 28 Car. II.). Cf. Barker *v.* Braham, 2 W. Bl. 866, 869.

[4] Lane *v.* Cotton, 12 Mod. 472, 488, T. 13 W. III. Cf. Mors *v.* Slew, 3 Keble, 135 (23 & 24 Car. II., 1671, 1672); also Mires *v.* Solebay, 2 Mod. 242, 244 (T. 29 Car. II.), for an exception by Scroggs, C. J.

[5] Sands *v.* Childs, 3 Lev. 351, 352; Perkins *v.* Smith, 3 Wilson, 328 (1752).

[6] 1 Bl. Comm. 431; Bac. Abr., *Master & Servant*, K. It is enough simply to refer to the law as to the liability of married women.

out in terms of master and servant and on the analogies which those terms suggested.

The history of agency as applied to contract is next to be dealt with. In this branch of the law there is less of anomaly and a smaller field in which to look for traces of fiction than the last. A man is not bound by his servant's contracts unless they are made on his behalf and by his authority, and that he should be bound then is plain common-sense. It is true that in determining how far authority extends, the question is of ostensible authority and not of secret order. But this merely illustrates the general rule which governs a man's responsibility for his acts throughout the law. If, under the circumstances known to him, the obvious consequence of the principal's own conduct in employing the agent is that the public understand him to have given the agent certain powers, he gives the agent those powers. And he gives them just as truly when he forbids their exercise as when he commands it. It seems always to have been recognized that an agent's ostensible powers were his real powers;[1] and on the other hand it always has been the law that an agent could not bind his principal beyond the powers actually given in the sense above explained.

There is, however, one anomaly introduced by agency even into the sphere of contract, — the rule that an undisclosed principal may sue or be sued on a contract made by an agent on his behalf; and this must be examined, although the evidence is painfully meagre. The rule would seem to follow very easily from the identification of agent and principal, as I shall show more fully in a moment. It is therefore well to observe at the outset that the power of contracting through others, natural as it seems, started from the family relations, and that it has been expressed in the familiar language of identification.

Generally speaking, by the Roman law contractual rights could not be acquired through free persons who were strangers to the family. But a slave derived a standing to

[1] Y. B. 27 Ass., pl. 5, fol. 133; Anon., 1 Shower, 95; Nickson v. Brohan, 10 Mod. 109, etc.

accept a promise to his master *ex persona domini*.[1] Bracton says that contracts can be accepted for a principal by his agent; but he starts from the domestic relations in language very like that of the Roman juris consults. An obligation may be acquired through slaves or free agents in our power, if they take the contract in the name of their master.[2]

It was said under Henry V. that a lease made by the seneschal of a prior should be averred as the lease of the prior,[3] and under James I. it was held that an assumpsit to a servant for his master was properly laid as an assumpsit to the master.[4] West's Symboleography belongs to the beginning of the same reign. It will be remembered that the language which has been quoted from that work applies to contracts as well as to torts. A discussion in the Year Book, 8 Edward IV., fol. 11, is thus abridged in Popham: "My servant makes a contract, or buys goods to my use; I am liable, and it is my act."[5] Baron Parke explains the requirement that a deed executed by an agent should be executed in the name of his principal, in language repeated from Lord Coke: "The attorney is . . . put in place of the principal and represents his person."[6] Finally, Chitty, still speaking of contracts, says, like West, that "In point of law the master and servant, or principal and agent, are considered as one and the same person."[7]

I have found no early cases turning upon the law of undisclosed principal. It will be remembered that the only action on simple contract before Henry VI., and the chief

[1] Inst. 3, 17, pr. See Gaius, 3, §§ 164–166.

[2] "Videndum etiam est per quas personas acquiratur obligatio, et sciendum quod per procuratores, et per liberos, quos sub potestate nostra habemus, et per nosmetipsos, et filios nostros et per liberos homines servientes nostros." Bract., fol. 100 *b*. So, "Etiam dormienti per servum acquiritur, ut per procuratorem, si nomine domini stipuletur." Bract., fol. 28 *b*.

[3] Y. B. 8 H. V. 4, pl. 17.

[4] Seignior & Wolmer's Case, Godbolt, 360 (T. 21 Jac.). Cf. Jordan's Case, Y. B. 27 H. VIII. 24, pl. 3.

[5] Drope *v.* Theyar, Popham, 178, 179 (P. 2 Car. I.).

[6] Hunter *v.* Parker, 7 M. & W. 322, 343 (1840); Combes's Case, 9 Rep. 75 *a*, 76 *b*, 77 (T. 11 Jac.). The fiction of identity between principal and agent was fully stated by Hobbes, who said many keen things about the law. Leviathan, Part I. ch. 16. "Of Persons, Authors, and things Personated." Also De Homine, I. c. 15. De Homine Fictitio.

[7] 1 Bl. Comm. 429, note.

one for a good while after, was debt, and that this was founded on a *quid pro quo* received by the debtor. Naturally, therefore, the chief question of which we hear in the earlier books is whether the goods came to the use of the alleged debtor.[1] It is at a much later date, though still in the action of debt, that we find the most extraordinary half of the rule under consideration first expressly recognized. In Scrimshire *v.* Alderton[2] (H. 16 G. II.) a suit was brought by an undisclosed principal against a purchaser from a *del credere* factor. Chief Justice Lee "was of opinion that this new method [*i. e.*, of the factor taking the risk of the debt for a larger commission] had not deprived the farmer of his remedy against the buyer." And he was only prevented from carrying out his opinion by the obstinacy of the jury at Guildhall. The language quoted implies that the rule was then well known, and this, coupled with the indications to be found elsewhere, will perhaps warrant the belief that it was known to Lord Holt.

Scott *v.* Surman,[3] decided at the same term that Scrimshire *v.* Alderton was tried, refers to a case of T. 9 Anne, Gurratt *v.* Cullum,[4] in which goods were sold by factors to J. S. without disclosing their principal. The factors afterwards went into bankruptcy. Their assignee collected the debt, and the principal then sued him for the money. "And this matter being referred by Holt for the opinion of the King's Bench, judgment was given on argument for the plaintiff. Afterwards at Guildhall, before Lord Chief Justice Parker, this case was cited and allowed to be law, because though it was agreed that payment by J. S. to [the factors] with whom the contract was made would be a discharge to J. S. against the principal, yet the debt was not in law due to them, but to the person whose goods they were . . . and being paid to the defendant who had no right to have it, it must be considered in law as paid for the use

[1] Fitz. Abr. *Dett*, pl. 3 (T. 2 R. II.). Cf. Alford *v.* Eglisfield, Dyer, 230 *b* (T. 6 Eliz.), and notes.

[2] 2 Strange, 1182.

[3] Willes, 400, at p. 405 (H. 16 G. II.).

[4] Also reported in Buller, N. P. 42. Cf. Whitecomb *v.* Jacob, 1 Salk. 160 (T. 9 Anne).

of him to whom it was due." This explanation seems to show that Chief Justice Parker understood the law in the same way as Chief Justice Lee, and, if it be the true one, would show that Lord Holt did also. I think the inference is somewhat strengthened by other cases from the Salkeld MSS. cited in Buller's *Nisi Prius*.[1] Indeed I very readily should believe that at a much earlier date, if one man's goods had come to another man's hands by purchase, the purchaser might have been charged, although he was unknown and had dealt through a servant,[2] and that perhaps he might have been, in the converse case of the goods belonging to an undisclosed master.[3]

The foregoing cases tend to show, what is quite probable, that the doctrine under discussion began with debt. I do not wish to undervalue the argument that may be drawn from this fact, that the law of undisclosed principal has no profounder origin than the thought that the defendant, having acquired the plaintiff's goods by way of purchase, fairly might be held to pay for them in an action of contract, and that the rule then laid down has been extended since to other contracts.[4]

But suppose what I have suggested be true, it does not dispose of the difficulties. If a man buys B.'s goods of A., thinking A. to be the owner, and B. then sues him for the price, the defendant fairly may object that the only contract which he has either consented or purported to make is a contract with A., and that a stranger, to both the intent and the form of a voluntary obligation cannot sue upon it. If the contract was made with the owner's consent, let the contractee bring his action. If it was made without actual

[1] Gonzales *v.* Sladen; Thorp *v.* How (H. 13 W. III.); Buller, N. P. 130.

[2] See Goodbaylie's Case, Dyer, 230 *b*, pl. 56, n.; Truswell *v.* Middleton, 2 Roll. R. 269, 270. Note, however, the insistence on the servant being known as such in Fitz. Abr. *Dett*, pl. 3; 27 Ass., pl. 5, fol. 133.

[3] Consider the doubt as to ratifying a distress made "generally not showing his intent nor the cause wherefore he distrained" in Godbolt, 109, pl. 129 (M. 28 & 29 Eliz.). Suppose the case had been contract instead of tort, and with actual authority, would the same doubt have been felt?

[4] Sims *v.* Bond, 5 B. & Ad. 389, 393 (1833). Cf. Bateman *v.* Phillips, 15 East, 272 (1812).

or ostensible authority, the owner's rights can be asserted in an action of tort. The general rule in case of a tortious sale is that the owner cannot waive the tort and sue in assumpsit.[1] Why should the fact that the seller was secretly acting in the owner's behalf enlarge the owner's rights as against a third person? The extraordinary character of the doctrine is still clearer when it is held that under a contract purporting to be made with the plaintiff and another jointly, the plaintiff may show that the two ostensible joint parties were agents for himself alone, and thus set up a several right in the teeth of words used and of the ostensible transaction, which gave him only a joint one.[2]

Now, if we apply the formula of identification and say that the agent represents the person of the owner, or that the principal adopts the agent's name for the purposes of that contract, we have at once a formal justification of the result. I have shown that the power of contracting through agents started from the family, and that principal and agent were identified in contract as well as in tort. I think, therefore, that the suggested explanation has every probability in its favor. So far as Lord Holt is concerned, I may add that in Gurratt *v.* Cullum the agent was a factor, that a factor in those days always was spoken of as a servant, and that Lord Holt was familiar with the identification of servant and master. If he was the father of the present doctrine, it is fair to infer that the technical difficulty was consciously or unconsciously removed from his mind by the technical fiction. And the older we imagine the doctrine to be, the stronger does a similar inference become. For just in proportion as we approach the archaic stage of the law, the greater do we find the technical obstacles in the way of any one attempting to enforce a contract except the actual party to it, and the greater therefore must have been the need of a fiction to overcome them.[3]

[1] Berkshire Glass Co. *v.* Wolcott, 2 Allen (Mass.), 227.

[2] Spurr *v.* Cass, L. R. 5 Q. B. 656. See further, Sloan *v.* Merrill, 135 Mass. 17, 19.

[3] Cf. The Common Law, ch. x. and xi. "Unsere heutigen Anschauungen . . . können sich nur schwer in ursprüngliche Rechtszustände hineinfinden, in welchen . . . bei Contrahirung oder Zahlung einer Schuld die handelnden Subjecte nicht als personae fungibiles galten."

The question which I have been considering arises in another form with regard to the admission of oral evidence in favor of or to charge a principal, when a contract has been made in writing, which purports on its face to be made with or by the alleged agent in person. Certainly the argument is strong that such evidence varies the writing, and if the Statute of Frauds applies, that the statute is not satisfied unless the name of the principal appears. Yet the contrary has been decided. The step was taken almost *sub silentio*.[1] But when at last a reason was offered, it turned on, or at least was suggested by, the notion of the identity of the parties. It was in substance that the principal "is taken to have adopted the name of the [agent] as his own, for the purpose of such contracts," as it was stated by Smith in his Leading Cases, paraphrasing the language of Lord Denman in Trueman *v.* Loder.[2]

I gave some evidence at the beginning of this discussion, that notions drawn from the *familia* were applied to free servants, and that they were extended beyond the domestic relations. All that I have quoted since tends in the same direction. For when such notions are applied to freemen in a merely contractual state of service it is not to be expected that their influence should be confined to limits which became meaningless when servants ceased to be slaves. The passage quoted from Bracton proved that already in his day the analogies of domestic service were applied to relations of more limited subjection. I have now only to complete the proof that agency in the narrower sense, the law familiar to the higher and more important representatives employed in modern business, is simply a branch of the law of master and servant.

First of the attorney. The primitive lawsuit was conducted by the parties in person. Counsel, if they may be

Brunner, Zulässigkeit der Anwaltschaft im französ. etc. Rechte. (Zeitschr. für vergleich. Rechtswissenschaft.) Norcross *v.* James, 140 Mass. 188, 189.

[1] Bateman *v.* Phillips, 15 East, 272 (1812); Garrett *v.* Handley, 4 B. & C. 664 (1825); Higgins *v.* Senior, 8 M. & W. 834, 844 (1841).

[2] 11 Ad. & El. 595; *s. c.* 3 P. & D. 267, 271 (1840); 2 Sm. L. C., 8th ed., 408, note to Thompson *v.* Davenport; Byington *v.* Simpson, 134 Mass. 169, 170.

called so, were very early admitted to conduct the formal pleadings in the presence of the party, who was thus enabled to avoid the loss of his suit, which would have followed a slip on his own part in uttering the formal words, by disavowing the pleading of his advocate. But the Frankish law very slowly admitted the possibility of giving over the conduct of a suit to another, or of its proceeding in the absence of the principals concerned. Brunner has traced the history of the innovation by which the appointment of an attorney (i. e., *loco positus*) came generally to be permitted, with his usual ability.[1] It was brought to England with the rest of the Norman law, was known already to Glanvill, and gradually grew to its present proportions. The question which I have to consider, however, is not the story of its introduction, but the substantive conception under which it fell when it was introduced.

If you were thinking of the matter *a priori* it would seem that no reference to history was necessary, at least to explain the client's being bound in the cause by his attorney's acts. The case presents itself like that of an agent authorized to make a contract in such terms as he may think advisable. But as I have hinted, whatever common-sense would now say, even in the latter case it is probable that the power of contracting through others was arrived at in actual fact by extending the analogy of slaves to freemen. And it is at least equally clear that the law had need of some analogy or fiction in order to admit a representation in lawsuits. I have given an illustration from Iceland in my book on the Common Law. There the contract of a suit was transferred from Thorgeir to Mord "as if he were the next of kin."[2] In the Roman law it is well known that the same difficulty was experienced. The English law agreed with the Northern sources in treating attorneys as sustaining the *persona* of their principal. The result may have been worked out in a different way, but that fundamental thought they had in

[1] [H. Brunner, Early History of the Attorney in English Law, translated in Illinois Law Review, 1908, III. 257. — Eds.]

[2] The Common Law, 359. See Brunner, in 1 Holtzendorff, Encyc. II. 3, A. 1, § 2, 3d ed., p. 166. 1 Stubbs, Const. Hist. 82.

common. I do not inquire into the recondite causes, but simply observe the fact.

Bracton says that the attorney represents the *persona* of his principal in nearly everything.[1] He was "put in the place of" his principal, *loco positus* (according to the literal meaning of the word *attorney*), as every other case in the *Abbreviatio Placitorum* shows. The *essoign de malo lecti* had reference to the illness of the attorney as a matter of necessity.[2] But, in general, the attorney was dealt with on the footing of a servant, and he is called so as soon as his position is formulated. Such is the language of the passage in West's Symboleography which I have quoted above, and the anonymous case which held an attorney not liable for maliciously acting in a cause which he knew to be unfounded.[3] When, therefore, it is said that the "act of the attorney is the act of his client," it is simply that familiar fiction concerning servants applied in a new field. On this ground it was held that the client was answerable in trespass, for assault and false imprisonment, where his attorney had caused the party to be arrested on a void writ, wholly irrespective, it would seem, of any actual command or knowledge on the part of the client;[4] and in trespass *quare clausum*, for an officer's breaking and entering a man's house and taking his goods by command of an attorney's agent without the actual knowledge either of the client or the attorney. The court said that the client was "answerable for the act of his attorney, and that [the attorney] and his agent [were] to be considered as one person."[5]

The only other agent of the higher class that I think it necessary to mention is the factor. I have shown elsewhere that he is always called a servant in the old books.[6] West's language includes factors as well as attorneys. Servant,

[1] "Attornatus fere in omnibus personam domini representat." Bract., fol. 342 *a*. See LL. Hen. I. 42, § 2.

[2] Bract., fol. 342 *a*. Cf. Glanv. XI., c. 3.

[3] Anon., 1 Mod. 209, 210 (H. 27 & 28 Car. II.).

[4] Parsons *v.* Loyd, 3 Wils. 341, 345; s. c. 2 W. Bl. 845 (M. 13 G. III. 1772); Barker *v.* Braham, 2 W. Bl. 866, 868, 869; s. c. 3 Wils. 368.

[5] Bates *v.* Pilling, 6 B. & C. 38 (1826).

[6] The Common Law, 228, n. 3, 181. See further generally, 230, and n. 4, 5.

factor, and attorney are mentioned in one breath and on a common footing in the Year Book, 8 Edward IV., folio 11 *b*. So Dyer,[1] "if a purveyor, factor, or servant make a contract for his sovereign or master." So in trover for money against the plaintiff's "servant and factor."[2] It is curious that in one of the first attempts to make a man liable for the fraud of another, the fraudulent party was a factor. The case was argued in terms of master and servant.[3] The first authority for holding a master answerable for his servant's fraud is another case of a factor.[4] Nothing is said of master and servant in the short note in Salkeld. But in view of the argument in Southern *v.* How, just referred to, which must have been before Lord Holt's mind, and the invariable language of the earlier books, including Lord Holt's own when arguing Morse *v.* Slue ("Factor, who is servant at the master's dispose"),[5] it is safe to assume that he considered the case to be one of master and servant, and it always is cited as such.[6]

To conclude this part of the discussion, I repeat from my book on the Common Law,[7] that as late as Blackstone agents appear under the general head of servants; that the precedents for the law of agency are cases of master and servant, when the converse is not the case; and that Blackstone's language on this point is express: "There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs;* whom, however, the law considers as servants *pro tempore*, with regard to such of their acts as affect their master's or employer's property."[8]

Possession is the third branch of the law in which the peculiar doctrines of agency are to be discovered, and to that I now pass.

[1] Alford *v.* Eglisfield, Dyer, 230 *b*, pl. 56.
[2] Holiday *v.* Hicks, Cro. Eliz. 638, 661, 746. See further, Malyne's Lex Merc., Pt. I. c. 16; Molloy, Book 3, c. 8, § 1; Williams *v.* Millington, 1 H. Bl. 81, 82.
[3] Southern *v* How, Cro. Jac. 468; s. c. Popham, 143.
[4] Hern *v.* Nichols, 1 Salk. 289.
[5] Mors *v.* Slew, 3 Keble, 72.
[6] Smith, Master and Servant, 3d ed., 266.
[7] P. 228 *et seq.*
[8] 1 Bl. Comm. 427.

The Roman law held that the possession of a slave was the possession of his master, on the practical ground of the master's power.[1] At first it confined possession through others pretty closely to things in custody of persons under the *patria potestas* of the possessor (including prisoners *bona fide* held as slaves). Later the right was extended by a constitution of Severus.[2] The common law in like manner allowed lords to appropriate lands and chattels purchased by their villeins, and after they had manifested their will to do so, the occupation of the villeins was taken to be the right of their lords.[3] As at Rome, the analogies of the *familia* were extended to free agents. Bracton allows possession through free agents, but the possession must be held in the name of the principal;[4] and from that day to this it always has been the law that the custody of the servant is the possession of the master.[5]

The disappearance of the servant under the *persona* of his master, of which a trace was discovered in the law of torts, in this instance has remained complete. Servants have no possession of property in their custody as such.[6] The distinction in this regard between servants and all bailees whatsoever[7] is fundamental, although it often has been lost sight of. Hence a servant can commit larceny[8] and cannot maintain trover.[9] A bailee cannot commit larceny[10] and can maintain trover.[11] In an indictment for larceny against a

[1] The Common Law, 228; Gaius, 3, §§ 164-166.

[2] Inst. 2. 9, §§ 4, 5; C. 7. 32. 1.

[3] Littleton, § 177. Cf. Bract. fol. 191 *a;* Y. B. 22 Ass., pl. 37, fol. 93; Litt., § 172; Co. Lit. 117 *a.*

[4] Bract., fol. 28 *b*, 42 *b*, 43, etc.; Fleta, IV., c. 3, § 1, c. 10, § 7, c. 11, § 1.

[5] Wheteley *v.* Stone, 2 Roll. Abr. 556, pl. 14; s. c. Hobart, 180; Drope *v.* Theyar, Popham, 178, 179.

[6] The Common Law, 227.

[7] The Common Law, 174, 211, 221, 243; Hallgarten *v.* Oldham, 135 Mass. 1, 9.

[8] Y. B. 13 Ed. IV. 9, 10, pl. 5; 21 H. VII. 14, pl. 21.

[9] The Common Law, 227, n. 2. The distinction mentioned above, under torts, between servants in the house and on a journey, led to the servant's being allowed an appeal of robbery, without prejudice to the general principle. Heydon & Smith's Case, 13 Co. Rep. 67, 69; Drope *v.* Theyar, Popham, 178, 179; Combs *v.* Hundred of Bradley, 2 Salk. 613, pl. 2; ib., pl. 1.

[10] 2 Bish. Crim. Law, § 833, 7th ed.

[11] The Common Law, 174, 243.

third person the property cannot be laid in a servant,[1] it may be laid in a bailee.[2] A servant cannot assert a lien;[3] a bailee, of course, may, even to the exclusion of the owner's right to the possessory actions.[4]

Here, then, is another case in which effects have survived their causes. But for survival and the fiction of identity it would be hard to explain why in this case alone the actual custody of one man should be deemed by the law to be the possession of another and not of himself.

A word should be added to avoid a misapprehension of which there are signs in the books, and to which I have adverted elsewhere.[5] A man may be a servant for some other purpose, and yet not a servant in his possession. Thus, an auctioneer or a factor is a servant for purposes of sale, but not for purposes of custody. His possession is not that of his principal, but, on the contrary, is adverse to it, and held in his own name, as is shown by his lien. On the other hand, if the fiction of identity is adhered to, there is nothing to hinder a man from constituting another his agent for the sole purpose of maintaining his possession, with the same effect as if the agent were a domestic servant, and in that case the principal would have possession and the agent would not.

Agency is comparatively unimportant in its bearing on possession, for reasons connected with procedure. With regard to chattels, because a present right of possession is held enough to maintain the possessory actions, and therefore a bailor, upon a bailment terminable at his will, has the same remedies as a master, although he is not one. With regard to real estate, because the royal remedies, the assizes, were confined to those who had a feudal seisin, and the party who had the seisin could recover as well when his lands were subject to a term of years as when they were in charge of agents or servants.[6]

[1] 2 East, P. C. 652, 653.
[2] Kelyng, 39.
[3] Bristow *v.* Whitmore, 4 De G. & J. 325, 334.
[4] Lord *v.* Price, L. R. 9 Ex. 54; Owen *v.* Knight, 4 Bing. N. C. 54, 57.
[5] The Common Law, 233.
[6] Bract., fol. 207 *a*. Cf. ib., 220. Heusler, Gewere, 126.

Ratification is the only doctrine of which the history remains to be examined. With regard to this I desire to express myself with great caution, as I shall not attempt to analyze exhaustively the Roman sources from which it was derived. I doubt, however, whether the Romans would have gone the length of the modern English law, which seems to have grown to its present extent on English soil.

Ulpian said that a previous command to dispossess another would make the act mine, and, although opinion was divided on the subject, he thought that ratification would have the same effect. He agreed with the latitudinarian doctrine of the Sabinians, who compared ratification to a previous command.[1] The Sabinians' "comparison" of ratification to mandate may have been a mere figure of speech to explain the natural conclusion that if one accepts possession of a thing which has been acquired for him by wrongful force, he is answerable for the property in the same way as if he had taken it himself. It therefore is hardly worth while to inquire whether the glossators were right in their comment upon this passage, that the taking must have been in the name of the assumed principal, — a condition which is ambiguously mentioned elsewhere in the Digest.[2]

Bracton copied Ulpian,[3] still, so far as I have observed, not going beyond cases of distress[4] and disseisin.[5] The first reported cases known to me are again assizes of novel disseisin.[6]

But later decisions went much beyond this point, as may be illustrated by one of them.[7] In trespass *de bonis asportatis* the defendant justified as bailiff. After charging the inquest Gascoigne said that "if the defendant took the chattels claiming property in himself for a heriot, although the lord

[1] D. 43, 16, 1, §§ 12, 14. Cf. D. 46, 3, 12, § 4.
[2] D. 43, 26, 13 (Pomponius).
[3] Bract., fol. 171 *b*.
[4] Fol. 158 *b*, 159 *a*.
[5] Fol. 171. But note that by ratification "suam facit injuriam, et ita tenetur ad utrumque, ad restitutionem, s. [et] ad pœnam." Ibid. *b*.
[6] Y. B. 30 Ed. I. 128 (Horwood) (where, however, the modern doctrine is stated and the Roman maxim is quoted by the judge); 38 Ass., pl. 9, fol. 223; s. c. 38 Ed. III. 18; 12 Ed. IV. 9, pl. 23; Plowden, 8 *ad fin.*, 27, 31.
[7] Y. B. 7 H. IV. 34, 35, pl. 1.

afterward agreed to that taking for services due him, still he [the defendant] cannot be called his bailiff for that time. But had he taken them without command, for services due the lord, and had the lord afterwards agreed to his taking, he shall be adjudged as bailiff, although he was nowhere his bailiff before that taking." A ratification, according to this, may render lawful *ab initio* an act which without the necessary authority is a good cause of action, and for which the authority was wanting at the time that it was done. Such is still the law of England.[1] The same principle is applied in a less startling manner to contract, with the effect of giving rights under them to persons who had none at the moment when the contract purported to be complete.[2] In the case of a tort it follows, of course, from what has been said that if it is not justified by the ratification, the principal in whose name and for whose benefit it was done is answerable for it.[3]

Now it may be argued very plausibly that the modern decisions have only enlarged the comparison of the Sabinians into a rule of law, and carried it to its logical consequences. The *comparatur* of Ulpian has become the *aequiparatur* of Lord Coke,[4] it might be said; ratification has been made equivalent to command, and that is all. But it will be seen

[1] Godbolt, 109, 110, pl. 129; s. c. 2 Leon. 196, pl. 246 (M. 28 & 29 Eliz.); Hull *v.* Pickersgill, 1 Brod. & B. 282; Muskett *v.* Drummond, 10 B. & C. 153, 157; Buron *v.* Denman, 2 Exch. 167 (1848); Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 13 Moore, P. C. 22 (1859), 86; Cheetham *v.* Mayor of Manchester, L. R. 10 C. P. 249; Wiggins *v.* United States, 3 Ct. of Cl. 412. But see Bro. Abr., *Trespass*, pl. 86; Fitz. Abr., *Bayllie*, pl. 4.

[2] Wolff *v.* Horncastle, 1 Bos. & P. 316 (1798). See further, Spittle *v.* Lavender, 2 Brod. & B. 452 (1821).

[3] Bract. 159 *a*, 171 *b*; Bro., *Trespass*, pl. 113; Bishop *v.* Montague, Cro. Eliz. 824; Gibson's Case, Lane, 90; Com. Dig., *Trespass*, c. 1; Sanderson *v.* Baker, 2 Bl. 832; s. c. 3 Wils. 309; Barker *v.* Braham, 2 Bl. 866, 868; s. c. 3 Wils. 368; Badkin *v.* Powell, Cowper, 476, 479; Wilson *v.* Tumman, 6 Man. & Gr. 236, 242; Lewis *v.* Read, 13 M. & W. 834; Buron *v.* Denman, 2 Exch. 167, 188; Bird *v.* Brown, 4 Exch. 786, 799; Eastern Counties Ry. *v.* Broom, 6 Exch. 314, 326, 327; Roe *v.* Birkenhead, Lancashire, & Cheshire Junction Ry., 7 Exch. 36, 44; Ancona *v.* Marks, 7 H. & N. 686, 695; Perley *v.* Georgetown, 7 Gray, 464; Condit *v.* Baldwin, 21 N. Y. 219, 225; Exum *v.* Brister, 35 Miss. 391; G. H. & S. A. Ry. *v.* Donahoe, 56 Tex. 162; Murray *v.* Lovejoy, 2 Cliff. 191, 195. (See 3 Wall. 1, 9.)

[4] Co. Lit. 207 *a*; 4 Inst. 317. It is *comparatur* in 30 Ed. I. 128; Bract. 171 *b*.

that this is a very great step. It is a long way from holding a man liable as a wrongful disseizor when he has accepted the wrongfully-obtained possession, to allowing him to make justifiable an act which was without justification when it was done, and, if that is material, which was followed by no possession on the part of the alleged principal.[1] For such a purpose why should ratification be equivalent to a previous command? Why should my saying that I adopt or approve of a trespass in any form of words make me responsible for a past act? The act was not mine, and I cannot make it so. Neither can it be undone or in any wise affected by what I may say.[2]

But if the act was done by one who affected to personate me, new considerations come in. If a man assumes the status of my servant *pro hac vice*, it lies between him and me whether he shall have it or not. And if that status is fixed upon him by my subsequent assent, it seems to bear with it the usual consequence as incident that his acts within the scope of his employment are my acts. Such juggling with words of course does not remove the substantive objections to the doctrine under consideration, but it does formally reconcile it with the general framework of legal ideas.

From this point of view it becomes important to notice that, however it may have been in the Roman law, from the time of the glossators and of the canon law it always has been required that the act should have been done in the name or as agent of the person assuming to ratify it. "Ratum quis habere non potest quod ipsius nomine non est gestum."[3] In the language of Baron Parke in Buron *v.* Denman,[4] "a subsequent ratification of an act done *as agent* is equal to a prior authority." And all the cases from that before Gascoigne

[1] Buron *v.* Denman, 2 Exch. 167 (1848).

[2] Ratification had a meaning, of course, when the usual remedy for wrongs was a blood-feud, and the head of the house had a choice whether he would maintain his man or leave him to the vengeance of the other party. See the story of Howard the Halt, 1 Saga Library, p. 50, ch. 14, end. Compare "although he has not received him" in Fitz. Abr., *Corone*, pl. 428, cited 4 Harv. Law Rev. 355.

[3] Sext. Dec. 5. 12. de Reg. Jur. (Reg. 9). It made the difference between excommunication and a mere sin in case of an assault upon one of the clergy. Ibid. 5, 11, 23.

[4] 2 Exch. 167.

downwards have asserted the same limitation.[1] I think we may well doubt whether ratification would ever have been held equivalent to command in the only cases in which that fiction is of the least importance had it not been for the further circumstance that the actor had assumed the position of a servant for the time being. The grounds for the doubt become stronger if it be true that the liability even for commanded acts started from the case of owner and slave.

In any event, ratification like the rest of the law of agency reposes on a fiction, and whether the same fiction or another, it will be interesting in the conclusion to study the limits which have been set to its workings by practical experience.

What more I have to say concerning the history of agency will appear in my treatment of the last proposition which I undertook to maintain. I said that finally I should endeavor to show that the whole outline of the law, as it stands to-day, is the resultant of a conflict between logic and good sense — the one striving to carry fictions out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust. To that task I now address myself.

I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility, — unless, that is to say, he has induced the immediate wrong-doer to do acts of which the wrong, or, at least, wrong, was the natural consequence under the circumstances known to the defendant. I assume that common-sense is opposed to allowing a stranger to my overt acts and to my intentions, a man of whom I have never heard, to set up a contract against me which I had supposed I was making with my personal friend. I assume that common-sense is opposed to the denial of possession to a servant and the assertion of it for a depositary, when the only difference between the two lies in the name by which the custodian is called. And I assume that the opposition of common-sense is intensi-

[1] *Supra*, pp. 401, 402, n. See also Fuller & Trimwell's Case, 2 Leon. 215, 216; New England Dredging Co. *v.* Rockport Granite Co., 149 Mass. 381, 382; Bract., fol. 28 *b*, 100 *b*.

fied when the foregoing doctrines are complicated by the additional absurdities introduced by ratification. I therefore assume that common sense is opposed to the fundamental theory of agency, although I have no doubt that the possible explanations of its various rules which I suggested at the beginning of this Essay, together with the fact that the most flagrant of them now-a-days often presents itself as a seemingly wholesome check on the indifference and negligence of great corporations, have done much to reconcile men's minds to that theory. What remains to be said I believe will justify my assumption.

I begin with the constitution of the relation of master and servant, and with the distinction that an employer is not liable for the torts of an independent contractor, or, in other words, that an independent contractor is not a servant. And here I hardly know whether to say that common-sense and tradition are in conflict, or that they are for once harmonious. On the one side it may be urged that when you have admitted that an agency may exist outside the family relations, the question arises where you are to stop, and why, if a man who is working for another in one case is called his servant, he should not be called so in all. And it might be said that the only limit is found, not in theory, but in common-sense, which steps in and declares that if the employment is well recognized as very distinct, and all the circumstances are such as to show that it would be mere folly to pretend that the employer could exercise control in any practical sense, then the fiction is at an end. An evidence of the want of any more profound or logical reason might be sought in the different circumstances that have been laid hold of as tests, the objections that might be found to each, and in the fact that doubtful cases are now left to the jury.[1]

[1] Among the facts upon which stress have been laid are the following: 1. Choice. Kelly *v.* Mayor of New York, 11 N. Y. 432, 436. See Walcott *v.* Swampscott, 1 Allen, 101, 103. But although it is true that the employer has not generally the choice of the contractor's servants, he has the choice of the contractor, yet he is no more liable for the contractor's negligence than for that of his servant. 2. Control. Sadler *v.* Henlock, 4 El. & Bl. 570, 578 (1855). Yet there was control in the leading case of Quarman *v.* Burnett, 6 M. & W. 499 (1840), where the employee was held not to be the defendant's servant. Cf. Steel *v.* Lester, 3 C. P. D. 121 (1877). 3. A round sum paid. But this was

On the other hand, it might be said that the master is made answerable for the consequences of the negligent acts "of those whom the law denominates *his servants*, because," in the language of that judgment which settled the distinction under consideration,[1] "such servants represent the master himself, and their acts stand upon the same footing as his own." That although the limits of this identification are necessarily more or less vague, yet all the proposed tests go to show that the distinction rests on the remoteness of personal connection between the parties, and that as the connection grows slighter, the likeness to the original case of menials grows less. That a contractor acts in his own name and on his own behalf, and that although the precise point at which the line is drawn may be somewhat arbitrary, the same is true of all legal distinctions, and that they are none the worse for it, and that wherever the line is drawn it is a necessary one, and required by the very definition of agency. I suppose this is the prevailing opinion.

I come next to the limit of liability when the relation of master and servant is admitted to exist. The theory of agency as applied to free servants no doubt requires that if the servant commits a wilful trespass or any other wrong, when employed about his own business, the master should not be liable. No free man is servant all the time. But the cases which exonerate the master could never have been decided as

true in Sadler *v.* Henlock, *sup.*, where the employee was held to be a servant. 4. Power to discharge. Burke *v.* Norwich & W. R. R., 34 Conn. 474 (1867). See Lane *v.* Cotton, 12 Mod. 472, 488, 489. But apart from the fact that this can only be important as to persons removed two stages from the alleged master, and not to determine whether a person directly employed by him is a servant or contractor, the power to discharge a contractor's servants may be given to the contractee without making him their master. Reedie *v.* London & Northwestern Ry. Co., 4 Exch. 244, 258. Robinson *v.* Webb, 11 Bush (Ky.), 464. 5. Notoriously distinct calling. Milligan *v.* Wedge, 12 Ad. & E. 737 (1840); Linton *v.* Smith, 8 Gray (Mass.), 47. This is a practical distinction, based on common-sense, not directly on a logical working out of the theory of agency. Moreover, it is only a partial test. It does not apply to all the cases.

In doubtful cases the matter seems now to be left to the jury, that ever-ready sword for the cutting of Gordian knots, as difficult questions of law generally are.

[1] Littledale, J., in Laugher *v.* Pointer, 5 B. & C. 547, 553 (T. 7 G. IV. 1826).

the result of that theory alone. They rather represent the revolt of common-sense from the whole doctrine when its application is pushed far enough to become noticeable.

For example, it has been held that it was beyond the scope of a servant's employment to go to the further side of a boundary ditch, upon a neighbor's land, and to cut bushes there for the purpose of clearing out the ditch, although the right management of the master's farm required that the ditch should be cleaned, and although the servant only did what he thought necessary to that end, and although the master relied wholly upon his servant's judgment in the entire management of the premises.[1]

Mr. Justice Keating said, the powers given to the servant "were no doubt very wide, but I do not see how they could authorize a wrongful act on another person's land or render his employers liable for a wilful act of trespass." It is true that the act could not be authorized in the sense of being made lawful, but the same is true of every wrongful act for which the principal is held. As to the act being wilful, there was no evidence that it was so in any other sense than that in which every trespass might be said to be, and as the judge below directed a verdict for the defendant, there were no presumptions adverse to the plaintiff in the case. Moreover, it has been said elsewhere that even a wilful act in furtherance of the master's business might charge him.[2]

Mr. Justice Grove attempted to draw the line in another way. He said, "There are some things which may be so naturally expected to occur from the wrongful or negligent conduct of persons engaged in carrying out an authority given, that they may be fairly said to be within the scope of the employment." But the theory of agency would require the same liability for both those things which might and those which might not be so naturally expected, and this is only revolt from the theory. Moreover, it may be doubted whether a case could be found where the servant's conduct

[1] Bolingbroke *v.* Swindon Local Board, L. R. 9 C. P. 575 (1874). Cf. Lewis *v.* Read, 13 M. & W. 834; Haseler *v.* Lemoyne, 5 C. B. N. S. 530.

[2] Howe *v.* Newmarch, 12 Allen, 49 (1866). See also cases as to fraud, *inf.*, and cf. Craker *v.* Chicago & N. W. Ry. Co., 36 Wisc. 657, 669 (1875).

was more naturally to be expected for the purpose of accomplishing what he had to do.[1]

The truth is, as pretty clearly appears from the opinions of the judges, that they felt the difficulty of giving a rational explanation of the doctrine sought to be applied, and were not inclined to extend it. The line between right and wrong corresponded with the neighbor's boundary line, and therefore was more easily distinguishable than where it depends on the difference between care and negligence, and it was just so much easier to hold that the scope of the servant's employment was limited to lawful acts.

I now pass to fraud. It first must be understood that, whatever the law may be, it is the same in the case of agents, *stricto sensu*, as of other servants. As has been mentioned, the fraudulent servant was a factor in the first reported decision that the master was liable.[2] Now if the defrauded party not merely has a right to repudiate a contract fraudulently obtained, or in general to charge a defendant to the extent that he has derived a benefit from another's fraud, but may hold him answerable *in solidum* for the damage caused by the fraudulent acts of his servant in the course of the latter's employment, the ground can only be the fiction that the act of the servant is the act of the master.

It is true that in the House of Lords[3] Lord Selborne said that the English cases "proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in Barwick's case[4]) "with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." But this only puts off the evil day. Why is the principal answerable in the case of any other wrong? It is, as has been seen, because, in the language of Mr. Justice Littledale, the "servants represent the master himself, and their acts stand upon the

[1] Cf. Harlow *v.* Humiston, 6 Cowen, 189 (1826).
[2] Hern *v.* Nichols, 1 Salk. 289.
[3] Houldsworth *v.* City of Glasgow Bank, 5 App. Cas. 317, 326, 327 (1880).
[4] L. R. 2 Ex. 259.

same footing as his own."[1] Indeed Mr. Justice Willes, in the very judgment cited by Lord Selborne, refers to Mr. Justice Littledale's judgment for the general principle. So Lord Denman, in Fuller *v.* Wilson,[2] "We think the principal and his agent are for this purpose completely identified." I repeat more distinctly the admission that no fiction is necessary to account for the rule that one who is induced to contract by an agent's fraud may rescind as against the innocent principal. For whether the fraud be imputed to the principal or not, he has only a right to such a contract as has been made, and that contract is a voidable one. But when you go beyond that limit and even outside the domain of contract altogether to make a man answer for any damages caused by his agent's fraud, the law becomes almost inconceivable without the aid of the fiction. But a fiction is not a satisfactory reason for changing men's rights or liabilities, and common-sense has more or less revolted at this point again and has denied the liability. The English cases are collected in Houldsworth *v.* City of Glasgow Bank.[3]

When it was attempted to carry identification one step further still, and to unite the knowledge of the principal with the statement of the agent in order to make the latter's act fraudulent, as in Cornfoot *v.* Fowke,[4] the absurdity became more manifest and dissent more outspoken. As was most accurately said by Baron Wilde in a later case,[5] "The artificial identification of the agent and principal, by bringing the words of the one side by side with the knowledge of the other, induced the apparent logical consequence of fraud. On the other hand, the real innocence of both agent and principal repelled the notion of a constructive fraud in either. A discordance of views, varying with the point from which the subject was looked at, was to be expected." The lan-

[1] Laugher *v.* Pointer, 5 B. & C. 547, 553. See Williams *v.* Jones, 3 H. & C. 602, 609.

[2] 3 Q. B. 58, 67; s. c. reversed on another ground, but admitting this principle, ib. 77 and 1009, 1010 (1842).

[3] 5 App. Cas. 317. See The Common Law, p. 231.

[4] 6 M. & W. 358 (1840). It is not necessary to consider whether the case was rightly decided or not, as I am only concerned with this particular ground.

[5] Udell *v.* Atherton, 7 H. & N. 172, 184 (1861).

guage of Lord Denman, just quoted, from Fuller *v.* Wilson, was used with reference to this subject.

The restrictions which common-sense has imposed on the doctrine of undisclosed principal are well known. An undisclosed principal may sue on his agent's contract, but his recovery is subject to the state of accounts between the agent and third person.[1] He may be sued, but it is held that the recovery will be subject to the state of accounts between principal and agent, if the principal has paid fairly before the agency was discovered; but it is, perhaps, doubtful whether this rule or the qualification of it is as wise as the former one.[2]

Then as to ratification. It has nothing to do with estoppel,[3] but the desire to reduce the law to general principles has led some courts to cut it down to that point.[4] Again, the right to ratify has been limited by considerations of justice to the other party. It has been said that the ratification must take place at a time and under circumstances when the would-be principal could have done the act;[5] and it has been so held in some cases when it was manifestly just that the other party should know whether the act was to be considered the principal's or not, as in the case of an unauthorized notice to quit, which the landlord attempts to ratify after the time of the notice has begun to run.[6] But it is held that bringing an action may be subsequently ratified.[7]

I now take up pleading. It is settled that an assumpsit[8] to or by a servant for his master may be laid as an assumpsit to or by the master. But these are cases where the master has commanded the act, and, therefore, as I showed in the beginning of this discussion, may be laid on one side. The

[1] Rabone *v.* Williams, 7 T. R. 360 (1785); George *v.* Clagett, 7 T. R. 359 (1797); Carr *v.* Hinchliff, 4 B. & C. 547 (1825); Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38 (1873); Semenza *v.* Brinsley, 18 C. B. N. S. 467, 477 (1865); *Ex parte* Dixon, 4 Ch. D. 133.

[2] Armstrong *v.* Stokes, L. R. 7 Q. B. 598, 610; Irvine *v.* Watson, 5 Q. B. D. 414.

[3] See Metcalf *v.* Williams, 144 Mass. 452, 454, and cases cited.

[4] Doughaday *v.* Crowell, 3 Stockt. (N. J.) 201; Bird *v.* Brown, 4 Exch. 788, 799.

[5] Bird *v.* Brown, 4 Exch. 788.

[6] Doe *v.* Goldwin, 2 Q. B. 143.

[7] Ancona *v.* Marks, 7 H. & N. 686.

[8] Seignior and Wolmer's Case, Godbolt, 360.

same thing is true of a trespass commanded by the master.[1] But when we come to conduct which the master has not commanded, but for which he is responsible, the difficulty becomes greater. It is, nevertheless, settled that in actions on the case the negligence of the servant is properly laid as the negligence of the master,[2] and if the analogy of the substantive law is to be followed, and the fiction of identity is to be carried out to its logical results, the same would be true of all pleading. It is so held with regard to fraud. "The same rule of law which imputes to the principal the fraud of the agent and makes him answerable for the consequences justifies the allegation that the principal himself committed the wrong."[3] Some American cases have applied the same view to trespass,[4] and have held that this action could be maintained against a master whose servant had committed a trespass for which he was liable although he had not commanded it. But these decisions, although perfectly reasonable, seem to have been due rather to inadvertence than to logic, in the first instance, and the current of authority is the other way. Baron Parke says, "The maxim '*Qui facit per alium, facit per se*' renders the master liable for all the negligent acts of the servant in the course of his employment, but that liability does not make the *direct* act of the servant the *direct* act of master. Trespass will not lie against him; case will, in effect, for employing a careless servant."[5] Considered as reasoning, it would be hard to unite more errors in as many words. "*Qui facit per alium, facit per se*" as an axiom admitted by common-sense goes no farther than to make a man liable for commanded trespasses, and for them trespass lies. If it be extended beyond that point it simply embodies the fiction, and the precise point of the fiction is that the direct act of one is treated as if it were the direct act of another. To avoid this conclusion a false reason is given for the

[1] Gregory *v.* Piper, 9 B. & C. 591.
[2] Brucker *v.* Fromont, 6 T. R. 659 (1796).
[3] Comstock, Ch. J., in Bennett *v.* Judson, 21 N. Y. 238 (1860); acc. Barwick *v.* English Joint Stock Bank, L. R. 2 Ex. 259 (1867).
[4] Andrew *v.* Howard, 36 Vt. 248 (1863); May *v.* Bliss, 22 Vt. 477 (1850).
[5] Sharrod *v.* London & N. W. Ry. Co., 4 Exch. 580, 585 (1849). Cf. Morley *v.* Gaisford, 2 H. Bl. 442 (1795).

liability in general.[1] It is, as has been shown, the old fallacy of the Roman jurists, and is disposed of by the decisions that no amount of care in the choice of one's servant will help the master in a suit against him.[2] But although the reasoning is bad, the language expresses the natural unwillingness of sensible men to sanction an allegation that the defendant directly brought force to bear on the plaintiff, as the proper and formal allegation, when as a matter of fact it was another person who did it by his independent act, and the defendant is only answerable because of a previous contract between himself and the actual wrong-doer.[3] Another circumstance may have helped. Usually the master is not liable for his servant's wilful trespasses, and, therefore, the actions against him stand on the servant's negligence as the alternative ground on which anybody is responsible. There was for a time a confused idea that when the cause of action was the defendant's negligence, the proper form of action was always case.[4] Of course if this was true it applied equally to the imputed negligence of a servant. And thus there was the farther possibility of confounding the question of the proper form of action with the perfectly distinct one whether the defendant was liable at all.

I come finally to the question of damages. In those States where exemplary damages are allowed, the attempt naturally has been made to recover such damages from masters when their servants' conduct has been such as to bring the doctrine into play. Some courts have had the courage to be consistent.[5] "What is the principle," it is asked, "upon which this rule of damages is founded? It is that the act of the agent is the act of the principal himself. . . . The law has established, to this extent, their legal unity and iden-

[1] The same reason is given in M'Manus *v.* Crickett, 1 East, 106, 108 (1800). Compare 1 Harg. Law Tracts, 347; Walcott *v.* Swampscott, 1 Allen, 101, 103; Lane *v.* Cotton, 12 Mod. 472, 488, 489.

[2] Dansey *v.* Richardson, 3 El. & Bl. 144, 161. See p. 406.

[3] M'Manus *v.* Crickett, 1 East. 106, 110 (1800); Brucker *v.* Fromont, 6 T. R. 659 (1796).

[4] Ogle *v.* Barnes, 8 T. R. 188 (1799). Cf. Leame *v.* Bray, 3 East, 593 (1803).

[5] New Orleans, Jackson, & Great Northern R. R. Co. *v.* Bailey, 40 Miss. 395, 452, 453, 456 (1866); acc. Atlantic & G. W. Ry. Co. *v.* Dunn, 19 Ohio St. 162.

tity. . . . This legal unity of the principal and agent, in respect to the wrongful or tortious, as well as the rightful acts, of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history." "If then the act of the agent be the act of the principal in law, and this legal identity is the foundation of the responsibility of the principal, there can be no escape from his indemnity to the full extent of civil responsibility." An instruction that the jury might give punitive damages was upheld, and the plaintiff had judgment for $12,000. Whatever may be said of the practical consequences or the English of the opinion from which these extracts are made, it has the merit of going to the root of the matter with great keenness. On the other hand, other courts, more impressed by the monstrosity of the result than by the *elegantia juris*, have peremptorily declared that it was absurd to punish a man who had not been to blame, and have laid down the opposite rule without hesitation.[1]

I think I now have made good the propositions which I undertook at the beginning of this essay to establish. I fully admit that the evidence here collected has been gathered from nooks and corners, and that although in the mass it appears to me imposing, it does not lie conspicuous upon the face of the law. And this is equivalent to admitting, as I do, that the views here maintained are not favorites with the courts. How can they be? A judge would blush to say nakedly to a defendant: "I can state no rational ground on which you should be held liable, but there is a fiction of law which I must respect and by which I am bound to say that you did the act complained of, although we both know perfectly well that it was done by somebody else whom the plaintiff could have sued if he had chosen, who was selected with the utmost care by you, who was in fact an eminently proper person for the employment in which he was engaged, and whom it was not only your right to employ, but much to the public advantage that you should employ." That would not

[1] Hagar *v.* Providence & Worcester R. R., 3 R. I. 88 (1854); Cleghorn *v.* New York Central & Hudson River R. R., 56 N. Y. 44 (1874). Cf. Craker *v.* Chicago & N. W. R. R., 36 Wis. 657 (1875).

be a satisfactory form in which to render a decision against a master, and it is not pleasant even to admit to one's self that such are the true grounds upon which one is deciding. Naturally, therefore, judges have striven to find more intelligible reasons, and have done so in the utmost good faith; for whenever a rule of law is in fact a survival of ancient traditions, its ancient meaning is gradually forgotten, and it has to be reconciled to present notions of policy and justice, or to disappear.

If the law of agency can be resolved into mere applications of general and accepted principles, then my argument fails; but I think it cannot be, and I may suggest, as another ground for my opinion beside those which I have stated heretofore, that the variety of reasons which have been offered for the most important application of the fiction of identity, the liability of the master for his servant's torts, goes far to show that none of those reasons are good. Baron Parke, as we have seen, says that case is brought in effect for employing a negligent servant. Others have suggested that it was because it was desirable that there should be some responsible man who could pay the damages.[1] Mr. Justice Grove thinks that the master takes the risk of such offences as it must needs be should come.

I admit my scepticism as to the value of any such general considerations, while on the other hand I should be perfectly ready to believe, upon evidence, that the law could be justified as it stands when applied to special cases upon special grounds.[2]

[1] See Williams *v.* Jones, 3 H. & C. 256, 263; 1 Harg. Law Tracts, 347.

[2] Cf. what is said as to common carriers in The Common Law, 204, 205.

PART VII

TORTS

64. The History of Trover.

JAMES BARR AMES

65. The History of the Law of Defamation.

VAN VECHTEN VEEDER

66. The History of Responsibility for Tortious Acts.

JOHN HENRY WIGMORE

[Other References on the Subjects of this Part are as follows:

In Select Essays:

The History of Agency (in Torts), by O. W. Holmes, Jr. (No. 63, Vol. III).

The Disseisin of Chattels, by J. B. Ames (No. 67, Vol. III).

In other Series and Journals:

Law and Morals, by J. B. Ames (Address at the 75th Anniversary of the Cincinnati Law School, 1908; reprinted in the Harvard Law Review, 1908, XXII, 97).

The Historical Method of the Study of Law, illustrated by the Master's Liability for his Servant's Tort, by J. M. Gest. (Address at the Temple College, Philadelphia, 1902.)]

64. THE HISTORY OF TROVER[1]

By James Barr Ames[2]

THE classic count in trover alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage. And yet throughout the history of this action the last of these five allegations has been the only one that the plaintiff must prove. The averments of loss and finding are notorious fictions, and that of demand and refusal is surplusage, being covered by the averment of conversion. Under the first allegation the plaintiff need not prove that the chattel was his own property, or that he was in actual possession of it. It is enough to show actual possession as a bailee, finder, or trespasser, or to prove merely an immediate right of possession.

A greater discrepancy than that here pointed out between a count and the evidence required to support it can hardly be found in any other action. But it is generally true that averments in pleading, however inaccurate, superfluous, or fictitious they may be at a given time, were once accurate and full of legal significance. The count in trover is no exception to this rule. To make this clear, however, it is necessary to consider in some detail the remedies at the command of the plaintiff, in early English law, for the asportation, detention, or destruction of chattels. These remedies

[1] This Essay was first published in the Harvard Law Review, 1897-1898, vol. XI, pp. 277-289, 374-386.

[2] A biographical note of this author is prefixed to Essay No. 43, in Volume II of this Collection. Additions are in brackets.

were the four actions, known as Appeals of robbery or larceny, Trespass, Replevin, and Detinue.

Appeal of Robbery or Larceny

For a century after the Norman Conquest there was no public prosecution of crime. Proceedings against wrong-doers, whether criminals or mere tort-feasors, depended upon the initiative of the parties injured, and took the form of private actions. These actions, in the royal courts, were called appeals, and, in their final development, fell into three classes: (1) the compensatory appeals, *i. e.*, appeals of battery, mayhem, and imprisonment, in which the appellor recovered damages; (2) the punitory appeals, *i. e.*, appeals of homicide, rape, arson, and also robbery or larceny of chattels worth 12*d.* or more, where the stolen chattels could not be recovered, in which the punishment of the defendant was the sole object;[1] (3) the recuperatory appeals of robbery or larceny, in which the appellor sought to recover the stolen chattels as well as to discover and punish the thief. It is with this class of appeals that we are concerned in this paper.

The procedure in the Anglo-Norman period is described by Glanvil, Bracton, Britton, and Fleta.[2] Britton's account is the fullest. The victim of the theft upon the discovery of his loss raised hue and cry, and with his neighbors made fresh pursuit after the thief. If the latter was caught, on fresh pursuit, with the "mainour," *i. e.*, with the pursuer's goods in his possession, the case was disposed of in the most summary manner. The prisoner was taken at once to an impromptu court, and if the pursuer, with others, made oath that the goods had been stolen from him, was straightway put to death, without a hearing, and the pursuer recovered

[1] "This appeal is not a real or personal action . . . the woman (appellor) is seeking vengeance for the death of her husband." Y. B. 9 Hen. IV. f. 2, pl. 8. The compensatory appeals, in their origin, were likewise actions for vengeance. 1 Nich. Britt. 124; Fleta, Lib. I. cap. 40, 42; Y. B. 18 Ed. III. f. 20, pl. 31; 2 Pollock & Maitland, Hist. Eng. Law, 487.

[2] Glanvil, Bk. 10, ch. 15-17; Bract. 150 b-152; 1 Nich. Britt. 55-60; Fleta, Lib. I. ch. 38; see also Mirror of Justices, Seld. Soc'y, Bk. III. c. 13.

his goods. Britton's statement is borne out by several reported cases.[1]

If not taken freshly on the fact, the person found in possession of the chattel had a right to be heard. The appellor, placing his hand upon the chattel,[2] charged the appellee with the theft. There were several modes of meeting the charge. The appellee might deny it *in toto*. The controversy was then settled by wager of battle, unless the appellee preferred a trial by jury.[3] The chattel went to the winner in the duel.

The appellee might, on the other hand, claim merely as the vendee or bailee of a third person. He would then vouch this third person as a warrantor to appear and defend the appeal in his stead. Glanvil gives the writ to compel the appearance of the warrantor.[4] If the warrantor failed to appear, or, appearing, successfully disputed the sale or bailment by wager of battle,[5] the appellor recovered the chattel, and the appellee was hanged. If the appellee won in the duel with the vouchee, the vouchee was hanged.[6] If the warrantor came and acknowledged the sale or bailment, the chattel was put temporarily in his hands, the appellee withdrew from the appeal, and the appellor thereupon appealed the warrantor as the thief or with the words that he knew no

[1] Northumberland Assize Rolls, 79 (40 Hen. III.). "Stephanus de S . . . captus fuit cum quodam equo furato per sectam Willelmi T. et decollatus fuit, praesente ballivo domini Regis, et praedictus equus deliberatus fuit praedicto W. qui sequebatur pro equo illo in pleno comitatu." In 1271 one Margaret appealed Thomas and Ralph for killing her brothers. But she was imprisoned for her false appeal, since Thomas and Ralph, who had pursued and beheaded her brothers as thieves taken with the "mainour," had acted according to the law and custom of the realm. Pl. Ab. 184, col. 1, rot. 24. This custom was condemned by the justices, in 1302, who said that one who had beheaded a manifest thief should be hanged himself. Y. B. 30 & 31 Ed. I. 545. See 2 Pollock & Maitland, Hist. Eng. Law, 495.

[2] Bract. Note Book, No. 824.

[3] As early as 1319 the rule was established that a thief taken with the "mainour" could not defend an appeal by wager of battle, but must put himself upon the jury; "for the appeal has two objects, to convict the thief and to recover the stolen chattel, and the law recognizes that the thief, though guilty, might by bodily strength vanquish the appellor and thus keep the chattel without reason." Fitz. Cor. 375. See also Fitz. Cor. 157, 125, 100, 268.

[4] Book X. ch. 16.

[5] Sel. Pl. of Crown, 1 Seld. Soc'y, No. 124.

[6] Bract. Note Book, No. 1435.

other thief than him.[1] The warrantor might in his turn vouch to warranty or dispute the appellor's right. If the appellor was finally successful against any warrantor, he recovered the chattel. If he was unsuccessful, the chattel was restored to the original appellee. This vouching to warranty is to be regarded as the following up of the trail of the thief, whose capture is an essential object of the whole procedure.

The appellee might, thirdly, though having no one to vouch as a warrantor, claim to have bought the chattel at a fair or market. Upon proof of this he was acquitted of the theft; but the appellor, upon proof of his former possession and loss of the chattel, recovered it. There was, as yet, no doctrine of purchase in market overt.

This private proceeding for the capture of the thief and recovery of the stolen chattel, as described in English law treatises and decisions of the thirteenth century, is of Teutonic origin. Its essential features are found in the Salic law of the fifth century;[2] but by the middle of the thirteenth century this time-honored procedure had seen its best days. The public prosecution of crime was introduced by the Assize of Clarendon in 1166, and with the increasing effectiveness of the remedy by indictment, the victims of robbery or theft were more and more willing to leave the punishment of wrong-doers in the hands of the Crown. On the other hand, the path of him who would use the appeal as a means of recovering the chattel stolen from him was beset with difficulties.

The appellor must, in the first place, have made fresh pursuit after the thief. In 1334 it was said by counsel that if he whose goods were stolen came within the year and a day, he should be received to have back his chattels. But Aldeburgh, J., answered: "Sir, it is not so in your case, but your statement is true in regard to waif and estray."[3]

[1] Sel. Pl. of Crown, 1 Seld. Soc'y, No. 192; Bract. Note Book, No. 67.

[2] Sohm, Der Process d. Lex. Salica; Jobbé-Duval, La Revendication des Meubles; Brunner, Rechtsgeschichte, 1st ed., I. 495 *et seq.*; Schroeder, Lehrbuch d. deutschen Rechtsgeschichte, 346 *et seq.*

[3] Y. B. 8 Ed. III. f. 10, pl. 30. See also Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 7 Hen. IV. f. 31, pl. 16; Y. B. 7 Hen. IV. f. 43, pl. 9; Roper's Case, 2 Leon. 108. In a case cited in Sel. Pl. Ct. Adm. 6 Seld. Soc'y,

Secondly, the thief must have been captured by the appellor himself or one of his company of pursuers. In one case the owner of the stolen chattel pursued the thief as far as a monastery, where the thief took refuge in the church and abjured the realm. Afterward the coroner delivered the chattel to the owner because he had followed up and tried to take the thief. For having foolishly delivered the chattel the coroner was brought to judgment before the justices in eyre.[1] So if the thief was arrested on suspicion by a bailiff, the king got the stolen chattel, because the thief was not arrested by the party.[2]

Thirdly, the thief must be taken with the goods in his possession. If, for instance, the goods were waived by the thief and seized by the lord of the franchise before the pursuers came up, the lord was entitled to them.[3]

Fourthly, the thief must be convicted on the pursuer's appeal. "It is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."[4] In one case the verdict in the case was not guilty, and that the appellee found the goods in the highway. The goods were present in the court. It was asked if the goods belonged to the appellor, and found that they did. Nevertheless, they were forfeited to the king.[5] In another case the thief was appealed by three persons for different thefts. He was convicted upon the first appeal and hanged. The goods stolen from the two other appellors were forfeited to the king.[6] The result was the same if the pursuer's failure to convict was because the thief rather than

XL., restitution was ordered in the Admiralty Court "because by the law maritime the ownership of goods taken by pirates is not divested unless the goods remain in the pirates' possession for a night." See also Y. B. 7 Ed. IV. f. 14, pl. 5; and compare Y. B. 22 Ed. III. f. 16, pl. 63.

[1] Y B. 30 & 31 Ed. I. 527.

[2] Fitz. Cor. 379 (12 Ed. II.). See also Y. B. 30 & 31 Ed. I. 509; Y. B. 30 & 31 Ed. I. 513; Fitz. Cor. 392 (8 Ed. II.); Fitz. Cor. 190, criticising Y. B. 26 Lib. Ass. 17.

[3] Dickson's Case, Hetley, 64. But see Rook and Denny, 2 Leon. 192.

[4] Y. B. 8 Ed. III. f. 10, pl. 30; Fitz. Avow. 151, per Schardelow, J.

[5] Fitz. Cor. 367 (3 Ed. III.).

[6] Y. B. 44 Ed. III. f. 44, pl. 57; Fitz. Cor. 95. But see Y. B. 7 Hen. IV. f. 31, pl. 16, Fitz. Cor. 21; and compare Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26.

be taken killed himself,[1] or took refuge in a church and abjured the realm,[2] or died in prison.[3]

Finally, since the rule which denied the right of defence by wager of battle to one taken with the "mainour" seems not to have been established before the fourteenth century,[4] the appellor was exposed to the risk of defeat and consequent loss of his chattels by reason of the greater physical skill and endurance of the appellee. There was the danger, also, that an appellee of inferior physical ability might fraudulently vouch as a warrantor an expert fighter, who, as a paid champion, would take the place of the original appellee. To avoid the duel with this champion, the appellor must establish by his *secta* or by an inquest that the ostensible warrantor was a hired champion.[5]

It is obvious from this account of the appeal of robbery or larceny that the absence of pecuniary redress against a thief must sooner or later become an intolerable injustice to those whose goods had been stolen, and that a remedy would be found for this injustice. This remedy was found in the form of an action for damages, the familiar action of

Trespass de Bonis Asportatis

The recorded instances of trespass in the royal courts prior to 1252 are very few. In the "Abbreviatio Placitorum" some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1194-1252, but not a

[1] Fitz. Cor. 318 (3 Ed. III.).

[2] Y. B. 30 Ed. I. 527; Fitz. Cor. 162 (3 Ed. III.). But see Fitz. Cor. 380 (12 Ed. II.) *semble*, and Y. B. 26 Lib. Ass. 32, Fitz. Cor. 194 (*semble*), *contra*.

[3] Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26. But see *contra*, Fitz. Cor. 379 (12 Ed. II.) and Fitz. Forf. 15 (44 Ed. III.). In the last half of the fourteenth century this rule was so far relaxed that the pursuer might recover his chattels if the conviction of the thief was prevented by his standing mute. Y. B. 26 Lib. Ass. 17; Y. B. 44 Lib. Ass. 30; Y. B. 8 Hen. IV. f. 1, pl. 2, Fitz. Cor. 71; or claiming benefit of clergy: Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 10 Hen. IV. f. 5, pl. 18, Fitz. Cor. 466; Y. B. 2 R. III. f. 12, pl. 31; Y. B. 3 Hen. VII. f. 12, pl. 10.

[4] *Supra*, n. 2, p. 419.

[5] The appellor succeeded in doing so in the case reported in Sel. Pl. Cor., 1 Seld. Soc'y, No. 192, and the champion with special leniency was condemned to the loss of one of his feet, instead of losing both foot and fist.

single case of trespass. In the year 37 Henry III. (1252-1253) no fewer than twenty-five cases of trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought. It is reasonable to suppose that the writ of trespass was at first granted as a special favor, and became, soon after the middle of the fourteenth century, a writ of course.

The introduction of this action was a very simple matter. An original writ issued out of Chancery directing the sheriff to attach the defendant to appear in the King's Bench to answer the plaintiff. The jurisdiction of the King's Court was based upon the commission of an act *vi et armis* and *contra pacem regis*, for which the unsuccessful defendant had to pay a fine. These words were therefore invariably inserted in the declaration. Indeed, the count in trespass was identical with the corresponding appeal, except that it omitted the offer of battle, concluded with an *ad dammum* clause, and substituted the words *vi et armis* for the words of felony, — *feloniter*, *felonice*, *in felonia*, or *in robberia*. The count in the appeal was doubtless borrowed from the ancient count in the popular or communal courts, the words of felony and *contra pacem regis* being added to bring the case within the jurisdiction of the royal courts.[1]

The procedure of the King's Courts was much more expeditious than that of the popular courts, the trial was by jury[2] instead of by wager of law, and judgment was satisfied by levy of execution and sale of the defendant's property, whereas in the popular courts distress and outlawry were the limits of the plaintiff's rights. As an appeal might be brought for the theft of any chattel worth 12*d.* or more, and as the owner now had an option to bring trespass where an appeal would lie, there was danger that the royal courts would be encumbered with a mass of petty litigation. To meet this threatened evil the Statute 6 Ed. I. c. 8 was passed, providing that no one should have writs of trespass before

[1] As there was no appeal for a trespass upon land, Sel. Pl. Cor. (Seld. Soc'y), No. 35, the action of trespass *quare clausum fregit* was brought into the royal courts directly from the popular courts.

[2] In one case the defendant offered wager of battle and the plaintiff agreed, but the court would not allow it. Y. B. 32 & 33 Ed. I. 319.

justices unless he swore by his faith that the goods taken away were worth 40 shillings at the least.

The plaintiff's right in trespass being the same as the appellor's right in the appeal, we may consider them together. Bracton says the appeal is allowed "utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua."[1] Britton and Fleta are to the same effect.[2] The right is defined with more precision in the "Mirror of Justices": "In these actions (appeals) two rights may be concerned, — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing had been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs."[3] The gist of the plaintiff's right was, therefore, possession, either as owner or as bailee.[4] On the death of an owner in possession of a charter the heir was constructively in possession, and could maintain trespass against one who anticipated him in taking physical possession of the charter.[5]

The bailor could not maintain an appeal, nor could he maintain the analogous *Anefangsklage* of the earlier Teutonic law.[6] He had given up the possession to the bailee, retaining only a *chose* in action. For the same reason the bailor was not allowed, for many years, to recover damages in trespass. As early as 1323, however, and, doubtless, by the fiction that the possession of a bailee at will was the possession of the bailor also, the latter gained the right to bring trespass.[7] In 1375 Cavendish, J., said, "He who has property

[1] Bract. 151. To the same effect, Bract. 103 b, 146 a.
[2] 1 Nich. Britt. 56; Fleta, Lib. 1, c. 39.
[3] Book II. c. 16 (Seld. Soc'y).
[4] For instances of appeals by bailees see Sel. Pleas of the Crown, Nos. 88 and 126, and for a recognition of the bailee's right in later times Fitz. Cor. 100 (45 Ed. III.); Y. B. 2 Ed. IV. f. 15, pl. 7; Keilw. 70, pl. 7.
[5] Y. B. 16 Ed. II. 490; Y. B. 1 Ed. III. f. 22, pl. 11. The owner could not have the action against a second trespasser, for the possession of the first trespasser, being adverse to owner, could not be regarded as constructively the owner's.
[6] 1 Brunner, Deutsche Rechtsgeschichte, 509.
[7] Y. B. 16 Ed. II. 490; Y. B. 5 Ed. III. f. 2, pl. 5.

may have trespass, and he who has custody another writ of trespass." And Persay answered: "It is true, but he who recovers first shall oust the other of his action."[1] And this has been the law ever since, where the bailment was at the will of the bailor. The innovation was not extended to the case of the pledgor,[2] or bailor for a term.[3]

This same distinction between a bailment at will and a bailment for a time is pointedly illustrated by the form of indictment for stealing goods from the bailee: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. . . . The ground of the decision in Rex *v.* Belstead and Rex *v.* Brunswick was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass."[4]

In like manner, it is probable that for an estray carried off trespass might have been brought by either the owner or the lord within the year and a day.[5] A servant could not bring trespass unless he had been intrusted with goods as a bailee by or for his master.[6] Nor could a servant maintain an appeal without his master.[7]

Trespass was an action for damages only,[8] *i. e.* a strictly

[1] Y. B. 48 Ed. III. f. 20, pl. 16.
[2] Y. B. 10 Hen. VI. f. 25, pl. 86.
[3] Ward *v.* Macaulay, 4 T. R. 489.
[4] Per Bayley, B., as cited in 2 Russ. Crimes (5th ed.), 245. The same distinction is made in 1 Hale P. C. 513.
[5] Y. B. 20 Hen. VII. f. 1, pl. 1. But in this same case the right of a distrainor to have trespass was denied.
[6] Y. B. 2 Edw. IV. f. 15, pl. 7, per Littleton; Heydon's Case, 13 Rep. 69; Bloss *v.* Holman, Ow. 52, per Anderson, C. J.; Goulds. 66, pl. 10, 72, pl. 18, *s. c.*
[7] The master could bring an appeal against a thief and offer to prove by the body of his servant who saw the theft, and the servant would accordingly charge the appellee of the same theft, and offer to prove by his body. 1 Rot. Cur. Reg. 51; 3 Bract. Note Book, No. 1664. See also Y. B. 30 & 31 Ed. I. 542; Fitz. Replev. 32 (19 Ed. III.).
[8] Pl. Ab. 336, col. 2, rot. 69 (14 Ed. II.); ibid. 346, col. 2, rot. 60 (17 Ed. II); Y. B. 1 Hen. IV. f. 4, pl. 5.

personal action. But being a substitute for the appeal, which gave the successful appellor the stolen *res*, the measure of damages would naturally be the value of the stolen *res*. This was the rule of damages even though the action was brought by a bailee[1] or by a trespasser against a second trespasser. The rule was at one time thought to be so inflexible as to deprive a bailee for a time of the right to bring trespass for a wrongful dispossession by his bailor. Hankford, J., said in one case: "Plaintiff shall not have the action, because then he would recover damages to the value of the beasts from him who owned them, and this is not right. But the plaintiff shall have an action on the case. But if a stranger takes beasts in my custody I shall have trespass against him and recover their value, because I am chargeable to my bailor who has the property, but here the case is different *quod* Hill and Culpepper, JJ., *concesserunt*."[2] It is needless to say that this is no longer law. The plaintiff has for centuries been allowed to recover in trespass against the bailor his actual loss.[3] On the same principle it was once ruled that a plaintiff could not have trespass if his goods had been returned to him; "for, as Fulthorp, J., said, the plaintiff ought not to have his goods and recover value too, therefore he should recover damages in trespass on the case for the detainer."[4] But Paston, J., said the jurors should allow for the return of the chattel in assessing the damages, and his view has, of course, prevailed.[5]

The close kinship between the appeal and trespass explains the nature of the trespasser's wrong to the plaintiff. A robber or thief dispossesses the owner with the design of excluding him from all enjoyment of the chattel. His act is essentially the same as that of one who ejects another from

[1] Y. B. 11 Hen. IV. f. 23, pl. 46; Y. B. 8 Ed. IV. f. 6, pl. 5; Heydon's Case, 13 Rep. 67, 69; Swire *v.* Leach, 18 C. B. N. S. 479. There are numerous cases in this country to the same effect. See, however, Claridge *v.* South Staffordshire Co., [1892], 1 Q. B. 422. [Overruled by The Winkfield [1902] P. 42.]

[2] Y. B. 11 Hen. IV. f. 23, pl. 46.

[3] Heydon's Case, 13 Rep. 67, 69; Brierly *v.* Kendall, 17 Q. B. 937.

[4] Y. B. 21 Hen. VI. f. 15, pl. 29.

[5] Br. Ab. Tresp. 221, 130; Chinnery *v.* Vial, 5 H. & N. 288, 295. See also Y. B. 21 & 22 Ed. I. 589. [Y. B. 1 Hen. VI. 7, pl. 30.]

his land, *i. e.*, a disseisin. Indeed, in many respects the recuperatory appeal of robbery or larceny is the analogue of the assize of novel disseisin. It is not surprising, therefore, to find that trespass for an asportation would not lie originally except for such a dispossession as in the case of land would amount to a disseisin.[1] If, for instance, a chattel was taken as a distress, trespass could not be maintained.[2] Replevin was the sole remedy. In 1447 the Commons prayed for the right to have trespass in case of distress where the goods could not be come at.[3]

In one respect trespass differed materially from the appeal and also from the assize of novel disseisin. The disseisee and the owner of the chattel could recover the land or the chattel from the grantee of the disseisor or thief. But the dispossessed owner of a chattel could not bring trespass for the value of the chattel against the grantee of the trespasser.[4] Even here, however, the analogy did not really fail. Trespass was an action to recover damages for a wrong done to the plaintiff by taking the chattel from his possession. The grantee of the trespasser had done no such wrong. Therefore, no damages were recoverable, and the action failed altogether. Similarly the grantee of the disseisor had done no wrong to the disseisee, and therefore, while he must surrender the land, he was not obliged, prior to the Statute of Gloucester, to pay damages to the demandant.[5] On the con-

[1] Trespass for the destruction of a chattel has been allowed from very early times. Y. B. 1 Ed. II. 41; Y. B. 11 Ed. II. 344; Y. B. 2 Ed. III. f. 2, pl. 5; Watson *v.* Smith, Cro. El. 723. There is in the *Registrum Brevium* no writ of trespass for a mere injury to a chattel, not amounting to its destruction. Presumably it was thought best that plaintiffs should seek redress for such minor injuries in the popular courts. There is an instance of such an action in 1247 in a manorial court of the Abbey of Bec. Sel. Pl. Man. Ct. (Seld. Soc'y) 10. In later times the remedy in the King's Bench was by an action on the case. Slater *v.* Swan, 2 Stra. 872. See also Marlow *v.* Weekes, Barnes' Notes, 452. Finally, trespass was allowed without question raised. Dand *v.* Sexton, 3 T. R. 37.

[2] Pl. Ab. 265, col. 2, rot. 8 (32 Ed. I.).

[3] 5 Rot. Parl. 139 b. (The petition *ibid.* 399 a seems to be the same petition.)

[4] Y. B. 21 Ed. IV. f. 74, pl. 6; Day *v.* Austin, Ow. 70; Wilson *v.* Barker, 4 B. & Ad. 614.

[5] Bract. 164, 172, 175 b; 2 Bract. Note Book, No. 617; Y. B. 37 Hen. VI. f. 35, pl. 22; Y. B. 13 Hen. VII. f. 15, pl. 11; Symons *v.* Symons, Hetl. 66.

trary, the demandant was in *misericordia* if he charged the grantee with disseisin.[1] By the same reasoning, just as the dispossessed owner of a chattel could not have trespass against a second trespasser,[2] so the demandant could not recover damages from a second disseisor.[3] The wrong in each case was against the first trespasser or disseisor, who had gained the fee simple or property, although a tortious fee simple or property.

The view here suggested, that the defendant's act in trespass *de bonis asportatis* was essentially the same as that of a disseisor in the case of land, has put the writer upon the track of what he believes to be the origin of the familiar distinction in the law of trespass *ab initio* between the abuse of an authority given by law, and the abuse of an authority given by the party, the abuse making one a trespasser *ab initio* in the one case but not in the other. As we have seen, replevin, and not trespass, was the proper action for a wrongful distress. If, however, when the sheriff came to replevy the goods, the landlord, claiming the goods as his own, refused to give them up, the replevin suit could not go on; the plaintiff must proceed either by appeal of felony, or by trespass.[4] The defendant by this assumption of dominion over the goods and repudiation of the plaintiff's right was guilty of a larceny and trespass. Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The plaintiff as before was driven to his appeal or trespass.[5]

Early in the reign of Edward III. the law was so far

[1] 2 Bract. Note Book, Nos. 617 and 1191.

[2] Y. B. 21 Ed. IV. f. 74, pl. 6. See Essay No. 67, *post*.

[3] Br. 172.

[4] "If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villein of the deforcer, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony if he thinks fit to do so." 1 Nich. Britt. 138. In Y. B. 21 & 22 Ed. I. 106, counsel being asked why the distrainor did not avow ownership when the sheriff came, answered: "If we had avowed ownership he would have sued an appeal against us."

[5] Y. B. 32 & 33 Ed. I. 54.

changed that the defendant's claim of ownership would not defeat the replevin action unless made before deliverance of the goods to the sheriff.[1] But the old rule continued, if the distrainor claimed ownership before the sheriff, until, by the new writ, *de proprietate probanda*, the plaintiff procured a deliverance in spite of the defendant's claim and thus was enabled to continue the replevin action as in the case of a voluntary deliverance. But the resort to this writ was optional with the plaintiff. He might still, if he preferred, treat the recusant defendant as a trespasser. In Rolle's Abridgment we read: "If he who has distrained detains the beasts after amends tendered before impounding, he is a trespasser *ab initio*. 45 Ed. III. 9 b. Contra, Co. 8, Six Carpenters, 147."[2]

What was true in the case of a distress was equally true of an estray. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirree*) in form of trespass, or an appeal of larceny, by words of felony."[3] In 1454 Prisot, J., in answer to counsel's suggestion that, if he lost a box of charters, he should have detinue, said: "I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice."[4]

On the other hand, a bailee who, in repudiation of his bailor's rights, refused to give back the chattel on request was never chargeable as a thief or trespasser.[5] Unlike the

[1] The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. Y. B. 5 Ed. III. f. 3, pl. 11; see Essay No. 67, *post*.

[2] 2 Roll. Ab. 561 [G], 7. The Year Book supports Rolle.

[3] 1 Nich. Britt. 68. See ibid. 215: "No person can detain from another birds or beasts, *ferae naturae*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays."

[4] Y. B. 33 Hen. VI. f. 26, pl. 12.

[5] Y. B. 16 Hen. VII. f. 2, pl. 7; 1 Ames & Smith, Cases on Torts, 252, 253, n. 1.

distrainor or finder, who took the chattel without the consent of the owner but by virtue of a rule of law, the bailee did not acquire the possession by a taking, but by the permission and delivery of the bailor. Hence it was natural to say that a subsequent tort made one a trespasser *ab initio* if he came to the possession of a chattel by act of law, but not if he came to its possession by act of the party. The rule once established in regard to chattels was then extended to trespasses upon realty and to the person.

The subsequent history of the doctrine of trespass *ab initio* is certainly curious. There seems to be no indication in the old books that anything but a refusal to give up the chattel would make the distrainor or finder a trespasser. But in the case, in which Prisot, C. J., gave the opinion already quoted, Littleton, of counsel, insisted that detinue and not trespass was the proper action against the distrainor or finder for refusal to give up the chattel on demand, but admitted that trespass would lie if they killed or used the chattel.[1] Littleton's view did not at once prevail.[2] But it received the sanction of Coke, who said that a denial, being only a nonfeasance, could not make one a trespasser *ab initio*;[3] and their opinion has ever since been the established law. A singular departure this of Littleton and Coke from the ancient ways — the doctrine of trespass *ab initio* inapplicable to the very cases in which it had its origin!

[1] "If I refuse to give up the distress, still he shall not have trespass against me, but detinue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters it was lawful, and although he did not give them up on request, he shall not have trespass, but detinue against me, for no trespass is done yet; no more than where one delivers goods to me to keep and redeliver to him, and I detain them, he shall never have trespass, but detinue against me *causa qua supra*." Y. B. 33 Hen. VI. f. 26, pl. 12.

[2] See Littleton's own statement when judge in Y. B. 13 Ed. IV. f. 6, pl. 2. According to Y. B. 2 Rich. III. f. 15, pl. 39: "It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detinue." In East *v.* Newman (1595), Golds. 152, pl. 79, a finder who refused to give up the goods to the owner was held guilty of a conversion, Fenner, J., saying: "For when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is."

[3] Isaac *v.* Clark, 1 Roll. R. 126.

Replevin

The gist of the action of trespass *de bonis asportatis*, as we have seen, was a taking from the plaintiff's possession under a claim of dominion. The trespasser, like a disseisor, acquired a tortious property. Trespass, therefore, would not lie for a wrongful distress; for the distrainor did not claim nor acquire any property in the distress. This is shown by the fact that he could not maintain trespass or trover if the distress was taken from him on the way to the pound, or taken out of the pound,[1] but must resort to a writ of *rescous* in the one case, and a writ of *de parco fracto* in the other case. In these writs the property in the distress was either laid in the distrainee, or not laid in any one.[2]

But the distrainee, although debarred from bringing trespass, was not without remedy for a wrongful distress. From a very early period he could proceed against the distrainor by the action, which after a time came to be known as Replevin. This action was based upon a taking of the plaintiff's chattels and a detention of them against gage and pledge. Hence Britton and Fleta treat of this action under the heading "De Prises de Avers" and "De captione averiorum," while in Bracton and the Mirrour of Justices the corresponding titles are "De vetito namio" and "Vee de Naam." In the first part of this paper it was shown that the action of replevin was originally confined to cases of taking by way of distress,[3] but that in the reign of Edward III. it became a concurrent remedy with trespass. But the change was for centuries one of theory rather than of prac-

[1] "The distrainor neither gains a general nor a special property, nor even the possession in the cattle or things distrained; he cannot maintain trover or trespass. . . . It is not like a pledgee, for he has a property for the time; and so of a bailment of goods to be redelivered, bailee shall have trespass against a stranger, because he is chargeable over." Per Parker, C. B., Rex *v.* Cotton, Parker, 113, 121. See also Y. B. 21 Hen. VII. f. 1, pl. 1; Whitly *v.* Roberts, McClell. & Y. 107, 108; 2 Selw. N. P. (1st ed.) 1362; 2 Saund. (6th ed.) 47 b, n. (c).

[2] "He shall not show in the writ to whom the property of the cattle doth appertain, unless he choose to do so." Fitz. N. B. 100. Compare Bursen *v.* Martin, Cro. Jac. 46, Yelv. 36, 1 Brownl. 192, s. c., in which case a count in trespass "Quare equum cepit a persona querentis" was adjudged bad for not alleging the horse to be "suum."

[3] *Supra*, p. 428. See also Essay No. 67, *post*.

tice. In the four hundred years preceding this century there are stray *dicta*, but, it is believed, no reported decision that replevin would lie against any adverse taker but a distrainor.[1] We need not be surprised, therefore, at Blackstone's statement that replevin "obtains only in one instance of an unlawful taking, that of a wrongful distress."[2] Lord Redesdale, in Shannon *v.* Shannon,[3] dissented from this statement, saying that replevin would lie for any wrongful taking, and his opinion has been generally regarded as law.[4] But the attempt to extend the scope of the action so as to cover a wrongful detention without any previous taking was unsuccessful.[5] From what has been said, it is obvious that replevin has played a very small part in the history of trover, and we may therefore pass without more to the last and, for the purpose of the present essay, the most important of our four actions, the action of

Detinue

The appeal, trespass, and replevin were actions *ex delicto*. Detinue, on the other hand, in its original form, was an action *ex contractu*, in the same sense that debt was a contractual action. It was founded on a bailment; that is, upon a delivery of a chattel to be redelivered.[6] The bailment might be at will or for a fixed term, or upon condition, as in the case of a pledge. The contractual nature of the action is shown in several ways.

In the first place the count must allege a bailment, and a traverse of this allegation was an answer to the action.[7]

[1] See Mellor *v.* Leather, 1 E. & B. 619. Replevin against one, who took as finder, was allowed in Taylor *v.* James, Godb. 150, pl. 195.

[2] 3 Bl. Com. 146.

[3] 1 Sch. & Lef. 327.

[4] George *v.* Chambers, 11 M. & W. 149.

[5] Mennie & Blake, 6 E. & B. 847. In many jurisdictions in this country, however, with or without the aid of a statute, replevin became concurrent with detinue.

[6] A buyer could also bring detinue against the seller for the chattel sold but not delivered. But the position of the seller after the bargain was essentially that of a bailee. For an early case of detinue by a buyer, see Sel. Pl. Man. Cts., 2 Seld. Soc'y (1275), 138. The count for such a case is given in *Novæ Narrationes*, f. 68. See also Y. B. 21 Ed. III. f. 12, pl. 2.

[7] Y. B. 3 Ed. II. 78; Y. B. 6 Ed. II. 192. Compare Y. B. 20 & 21 Ed. I. 193. After the scope of detinue was enlarged, a traverse of

Again, detinue could not be maintained against a widow in possession of a chattel bailed to her during her marriage, because "ele ne se peut obliger."[1] Nor, for the same reason, would the action lie against husband and wife on a bailment to them both.[2] Thirdly, on a bailment to two or more persons, all must be joined as defendants, for all were parties to the contract.[3] On the same principle, all who joined in bailing a chattel must be joined as plaintiffs in detinue.[4] On the other hand, on the bailment by one person of a thing belonging to several, the sole bailor was the proper plaintiff.[5] For it was not necessary in detinue upon a bailment, as it was in replevin and trespass, to allege that the chattels detained were the "goods of the plaintiff."[6] Fourthly, the gist of the action of detinue was a refusal to deliver up the chattel on the plaintiff's request; that is, a breach of contract. Inability to redeliver was indeed urged in one case as an objection to the action, although the inability was due to the active misconduct of the defendant. "*Brown*. If you bail to me a thing which is wastable, as a tun of wine, and I perchance drink it up with other good fellows, you cannot have detinue, inasmuch as the wine is no longer *in rerum natura*, but you may have account before auditors, and the value shall be found." This, Newton, C. J., denied, saying detinue was the proper remedy.[7] It may be urged that the detinue in this case was founded upon a tort. But in truth the gist of the action was the refusal to deliver on request. This is brought out clearly by the case of Wilkinson *v.* Verity.[8] The defendant, a bailee, sold the chattel intrusted

the bailment became an immaterial traverse. Gledstane *v.* Hewitt, 1 Cr. & J. 565; Whitehead *v.* Harrison, 6 Q. B. 423, in which case the court pointed out a serious objection to the modern rule.

[1] Y. B. 20 & 21 Ed. I. 189.

[2] Y. B. 38 Ed. III. f. 1, pl. 1; 1 Chitty Pl. (7th ed.) 104, 138.

[3] Y. B. 7 Hen. IV. f. 6, pl. 37.

[4] Atwood *v.* Ernest, 13 C. B. 881.

[5] Y. B. 8 Ed. II. 270; Y. B. 49 Ed. III. f. 13, pl. 6, because "they (the owners) were not parties to the contract and delivery;" Bellewe, Det. Charters, 13 R. II.

[6] Whitehead *v.* Harrison, 6 Q. B. 423, citing many precedents.

[7] Y. B. 20 Hen. VI. f. 16, pl. 2. To the same effect, 7 Ed. III., Stath. Abr., Detinue, pl. 9; Y. B. 17 Ed. III. f. 45, pl. 1; 20 Ed. III., Fitz. Abr. Office del Court, 22.

[8] L. R. 6 C. P. 206; Ganley *v.* Troy Bank, 98 N. Y. 487, accord.

to his care. Eleven years after this conversion the bailor demanded the redelivery of the chattel, and upon the bailee's refusal obtained judgment against him on the breach of the contract, although the claim based upon the tort was barred by the Statute of Limitations. The breach of contract is obvious where the bailee was charged in detinue for a pure nonfeasance, as where the goods were lost.[1] Fifthly, bailees were chargeable in *assumpsit*, after that action had become the common remedy for the breach of parol contracts.[2]

Finally, we find, as the most striking illustration of the contractual nature of the bailment, the rule of the old Teutonic law that a bailor could not maintain detinue against any one but the bailee. If the bailee bailed or sold the goods, or lost possession of them against his will, the sub-bailee, the purchaser, and even the thief, were secure from attack by the bailor. This doctrine maintained itself with great persistency in Germany and France.[3] In England the ancient tradition was recognized in the fourteenth century. In 1351 Thorpe (a judge three years later) said: "I cannot recover against any one except him to whom the charter was bailed."[4] Belknap (afterwards Chief Justice) said in 1370: "In the lifetime of the bailee detinue is not given against any one except the bailee, for he is chargeable for life."[5] Whether it was ever the law of England that the bailor was without remedy, if the bailee died in possession of the chattel, must be left an open question.[6] In a case of the year 1323 it was gener-

[1] Reeve *v.* Palmer, 5 C. B. N. S. 84. The early authorities are cited by Professor Beale in Essay No. 54, *ante*.

[2] Wheatley *v.* Lowe, Palm. 28; Cro. Jac. 668, s. c. See Essay No. 59, *ante*.

[3] Heusler, Die Gewere, 487; Carlin, Niemand kann auf einen Anderen mehr Recht übertragen als er selbst hat, 42, 48; Jobbé-Duval, La Revendication des Meubles, 80, 165.

[4] Y. B. 24 Ed. III. f. 41, A, pl. 22.

[5] Y. B. 43 Ed. III. f. 29, pl. 11.

[6] In Sel. Cas. in Ch., 10 Seld Soc'y No. 116 (1413-1417), a plaintiff, before going to Jerusalem, had bailed a coffer containing title deeds and money to his mother. The mother died during his absence, and her husband, the plaintiff's stepfather, refused to give up the coffer to the son on his return. The plaintiff brought his bill in chancery alleging that "because he [stepfather] was not privy or party to the delivery of the coffer to the wife no action is maintainable at common law, to the grievous damage," etc., "if he be not succoured by your most gracious lordship where the common law fails him in this case." See also Y. B. 20 & 21 Ed. I. 189.

ally agreed that the executor of a bailee was liable in detinue.[1] But the plaintiff in that case, who alleged a bailment of a deed to A, and that the deed came to the hands of the defendant after A's death, and that defendant refused to deliver on request, failed because he did not make the defendant privy to A as heir or executor. Afterwards, however, the law changed, and it was good form to count of a bailment to A, and a general *devenerunt ad manus* of the defendant after A's death.[2] Belknap's statement also ceased to be law, and detinue was allowed in the lifetime of the bailee against any one in possession of the chattel.[3] In other words, the transformation in the manner just described, of the bailor's restricted right against the bailee alone, to an unrestricted right against any possessor of the chattel bailed, virtually converted his right *ex contractu* into a right *in rem*.

It is interesting to compare this transformation with the extension at a later period of the right of the *cestuy que trust*. In the early days of uses the *cestuy que use* could not enforce the use against any one but the original feoffee to uses. In 1482 Hussey, C. J., said: "When I first came to court, thirty years ago, it was agreed in a case by all the court that if a man had enfeoffed another in trust, if the latter died seised so that his heir was in by descent, that then no *subpœna* would lie."[4] Similarly, the husband or wife of the feoffee to uses were not bound by the use.[5] Nor was there at first any remedy against the grantee of the feoffee to uses although he was a volunteer, or took with notice of the use, because as Frowicke, C. J., said, "The confidence which

[1] Y. B. 16 Ed. II. 490.

[2] Y. B. 29 Ed. III. 38, B, per Wilby, J.; Y. B. 9 Hen. V. f. 14, pl. 22; Y. B. 9 Hen. VI. f. 58, pl. 4. Paston, J. "The count is good enough notwithstanding he does not show how the deed came to defendant, since he has shown a bailment to B (original bailee) at one time." Martin, J. "He ought to show how it came to defendant." Paston, J. "No, for it may be defendant found the deed, and if what you say is law, twenty records in this court will be reversed."

[3] Y. B. 11 Hen. IV. f. 46, B, pl. 20; Y. B. 12 Ed. IV. f. 11, pl. 2, and f. 14, pl. 14; Y. B. 10 Hen. VII. f. 7, pl. 14.

[4] Y. B. 22 Ed. IV. f. 6, pl. 22. In Keilw. 42, pl. 7, Vavasour, J., said, in 1501, that the subpœna was never allowed against the heir until the time of Henry VI., and that the law on this point was changed by Fortescue, C. J.

[5] Ames, Cases on Trusts (2d ed.), 374, n.

the feoffor put in the person of his feoffee cannot descend to his heir nor pass to the feoffee of the feoffee, but the latter is feoffee to his own use, as the law was taken until the time of Henry IV. [VI.?]." [1] One is struck by the resemblance between this remark of the English judge and the German proverb about bailors: "Where one has put his trust, there must he seek it again." [2] The limitation of the bailor at common law, and the *cestui que trust* in equity, to an action or suit against the original bailee or trustee, are but two illustrations of one characteristic of primitive law, the inability to create an obligation without the actual agreement of the party to be charged.[3]

A trust, as every one knows, has been enforceable for centuries against any holder of the title except a purchaser for value without notice. But this exception shows that the *cestui que trust*, unlike the bailor, has not acquired a right *in rem*. This distinction is, of course, due to the fundamental difference between common-law and equity procedure. The common law acts *in rem*. The judgment in detinue is, accordingly, that the plaintiff recover the chattel, or its value. Conceivably the common-law judges might have refused to allow the bailor to recover in detinue against a *bona fide* purchaser, as they did refuse it against a purchaser in market overt. But this would have involved a weighing of ethical considerations altogether foreign to the medieval mode of thought. Practically there was no middle ground between restricting the bailor to an action against his bailee, and giving him a right against any possessor. Equity, on the other hand, acts only *in personam*, never decreeing that a plaintiff recover a *res*, but that the defendant surrender what in justice he cannot keep. A decree against a *mala fide* purchaser or a volunteer is obviously just; but a decree

[1] Anon., Keilw. 46, pl. 7. See also Ames, Cases on Trusts (2d ed.), 282-285.

[2] Wo man seinen Glauben gelassen hat, da muss man ihn wieder suchen.

[3] This same inability explains the late development of assumpsit upon promises implied in fact, and of *quasi*-contracts. The necessity of the invention of the writ *quare ejecit infra terminum* as a remedy for a termor, who had been ousted by his landlord's vendee, was due to this same primitive conception, for the vendee was not chargeable by the landlord's contract.

against an innocent purchaser, who has acquired the legal title to the *res*, would be as obviously unjust.

In all the cases of detinue thus far considered the action was brought by a bailor, either against the bailee or some subsequent possessor. We have now to consider the extension of detinue to cases where there was no bailment. Legal proceedings for the recovery of chattels lost were taken, in the earliest reported cases, in the popular courts. The common case was doubtless that of an animal taken as an estray by the lord of a franchise. If the lord made due proclamation of the estray, and no one claimed it for a year and a day, the lord was entitled to it. But within the year and day the loser might claim it, and if he produced a sufficient *secta*, or body of witnesses, to swear to his ownership or loss of the animal, it was customary for the lord to give it up, upon the owner's paying him for its keep, and giving pledges to restore it in case of any claim for the same animal being made within the year and day.[1] There is an interesting case of the year 1234, in which after the estray had been delivered to the claimant upon his making proof and giving pledges, another claimant appeared. It is to be inferred from the report that the second claimant finally won, as he produced the better *secta*.[2] If the lord, or other person in whose hands the estray or other lost chattel was found, refused to give it up to the claimant, the latter might count against the possessor for his *res adirata*, or *chose adirrée*, that is, his chattel gone from his hand without his consent;[3] or he might bring an appeal of larceny.[4] According to

[1] Sel. Pl. Man. Cts., 2 Seld. Soc'y (1281), 31. "Maud, widow of Reginald of Challon, has sufficiently proved that a certain sheep (an estray) valued at 8*d*. is hers, and binds herself to restore it or its price in case it shall be demanded from her within year and day; pledges John Ironmonger and John Roberd; and she gives the lord 3*d*. for his custody of it." There is a similar case in the Court Baron, 4 Seld. Soc'y (1324), 144.

[2] 3 Bract. Note Book, No. 1115.

[3] *Adiratus* is doubtless a corruption of *adextratus*, i. e., out of hand. In the precedents of trover and detinue sur trover in Coke's Entries, the plaintiff alleged that he casually lost the chattel "extra manus et possessionem." Co. Ent. 38, pl. 31; 40, pl. 32; 169, d, pl. 2.

[4] "And if the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirrée*), in form of trespass, or an appeal of larceny by words of felony." Britton, f. 27. See also Britton, f. 46.

Bracton, the pursuer of a thief was allowed "rem suam petere ut adiratam per testimonium proborum hominum et si consequi rem suam quamvis furatam."[1] This statement of Bracton, taken by itself, would warrant the belief that the successful plaintiff in the action for a *chose adirrée* had judgment for the recovery of the chattel. This may have been the fact; but it is difficult to believe that such a judgment was given in the popular court. No intimation of such a judgment is to be found in any of the earlier cases. It seems probable that Bracton meant simply that the plaintiff might formally demand his chattel in court as *adiratum*, and, by the defendant's compliance with the demand, recover it. For, in the sentence immediately following, Bracton adds that if the defendant will not comply with his demand, — "si . . . in hoc ei non obtemperaverit," — the plaintiff may proceed further and charge him as a thief by an appeal of larceny. This change from the one action to the other is illustrated by a case of the year 1233.[2] The count for a *chose adirrée* is described in an early Year Book.[3] The latest recognition of this action that has been found is a precedent in Novae Narrationes, f. 65, which is sufficiently interesting to be reproduced here in its original form.

De Chyval Dedit

Ceo vous monstre W. &c. que lou il avoit un son chival de tiel colour price de taunt, tiel jour an et lieu, la luy fyst cel cheval dedire [adirré], et il alla querant dun lieu en autre, et luy fist demander en monstre fayre & marche et de son chival

[1] Bract. 150 b. See also Fleta, 55, 63.

[2] Bract. Note Book, No. 824. The plaintiff "dixit quod idem Willelmus in pace dei et Dom. Regis et ballivorum in juste detinuit ei tres porcos qui ei fuerunt addirati, et inde producit sectam quod porci sui fuerunt et ei porcellati et postea addirati." William disputed the claim, and the plaintiff then charged William as the thief "et parata fuit hoc disracionare versus eum, sicut femina versus latronem, quod legale catallum suum nequiter ei contradixit."

[3] 20 Ed. I. 466. "Note that where a thing belonging to a man is lost (*endire*), he may count that he (the finder) tortiously detains it, etc., and tortiously for this that whereas he lost (*ly fut endire*) the said thing on such a day, etc., he (the loser) on such a day, etc., and found it in the house of such an one and told him, etc., and prayed him to restore the thing, but that he would not restore it, etc., to his damage, etc.; and if he will, etc. In this case the demandant must prove by his law (his own hand the twelfth) that he lost the thing."

ne poet este acerte, ne poet oier tanquam a tiel jour quil vient et trova son cheval en la garde W. de C. que illonques est s. en la gard mesme cesty W. en mesme la ville, et luy dit coment son chival fuit luy aderere et sur ceo amena suffisantz proves de prover le dit chival estre son, devant les baylliefz et les gentes de la ville, & luy pria qui luy fist deliveraunce, et il ceo faire ne voyleit ne uncore voet, a tort et as damages le dit W. de XX. s. Et sil voet dedire &c. [vous avez cy &c. que ent ad suit bon].

This count points rather to damages than to the recovery of the horse. It is worthy of note, also, that its place in the "Novae Narrationes" is not with the precedents in detinue, but with those in trespass. There seems to be no evidence of an action of *chose adirrée* in the royal courts. Nor has any instance been found in these courts of detinue by a loser against a finder prior to 1371.[1] In that year a plaintiff brought detinue for an ass, alleging that it had strayed from him to the seignory of the defendant, and that he one month afterwards offered the defendant reasonable satisfaction (for the keep). Issue was joined upon the reasonableness of the tender.[2] Detinue by a loser against a finder would probably have come into use much earlier but for the fact, pointed out in the first part of this paper, that the loser might bring trespass against a finder who refused to restore the chattel on request. Indeed, in 1455,[3] where a bailiff alleged simply his possession, and that the charters came to the defendant by finding, Prisot, C. J., while admitting that a bailor might have detinue against any possessor of goods lost by the bailee, expressed the opinion that where there was no bailment the loser should not bring detinue, but trespass, if, on demand, the finder refused to give up the goods. Littleton insisted that detinue would lie, and his view afterwards prevailed. It was in this case that Littleton, in an aside, said: "This declaration *per inventionem*

[1] In Y. B. 2 Ed. III. f. 2, pl. 5, there is this *dictum* by Scrope, J.: "If you had found a charter in the way, I should have a recovery against you by *præcipe quod reddat*."

[2] Y. B. 44 Ed. III. f. 14, pl. 30. See also 13 Rich. II., Bellewe, Det. of Chart. Detinue against husband and wife. Count that they found the charters.

[3] Y. B. 33 Hen. VI. f. 26, pl. 12.

is a new-found Halliday; for the ancient declaration and entry has always been that the charters *ad manus et possessionem devenerunt* generally without showing how." Littleton was quite right on this point.[1] But the new fashion persisted, and detinue *sur trover* came to be the common mode of declaring wherever the plaintiff did not found the action upon a bailment to the defendant. In the first edition of "Liber Intrationum" (1510), f. 22, there is a count alleging that the plaintiff was possessed of a box of charters; that he casually lost it, so that it came to the hands and possession of the defendant by finding, and that he refused to give it up on request.[2] The close resemblance between this precedent and the earlier one from "Novae Narrationes" will have occurred to the learned reader. But there is one difference. In the count for a *chose adirrée*, it is the plaintiff who finds the chattel in the defendant's possession. In detinue *sur trover* the finding alleged is by the defendant. And until we have further evidence that the action in the popular courts was for the recovery of the chattel and not for damages only, it seems reasonable to believe that detinue *sur trover* in the king's courts was not borrowed from the action of *chose adirrée*, but was developed independently out of detinue upon a general *devenerunt ad manus*. But whatever question there may be on this point, no one can doubt that detinue *sur trover* was the parent of the modern action of trover.

Add to the precedent in the "Liber Intrationum" the single averment that the defendant converted the chattel to his own use, and we have the count in trover.

It remains to consider how the action of trover at first became concurrent with detinue, and then effectually supplanted it until its revival within the last fifty years.

[1] Littleton's remark seems to have been misapprehended in 2 Pollock & Maitland, 174. The innovation was not in allowing detinue where there was no bailment, but in describing the defendant as a finder. The old practice was to allege simply that the goods came to the hands of the defendant, as in Y. B. 3 Hen. VI. f. 19, pl. 31. See also Isaac *v.* Clark, 1 Bulst. 128, 130. In 1655 it was objected to a count in trover and conversion that no finding was alleged, but only a *devenerunt ad manus*. The objection was overruled. Hudson *v.* Hudson, Latch, 214.

[2] A similar count in Lib. Int. f. 71.

There were certain instances in which detinue, in its enlarged scope, and trespass, did not adequately protect owners of chattels. Neither of these actions would serve, for instance, if a bailee or other possessor misused the goods, whereby their value was diminished, but nevertheless delivered them to the owner on request. The owner's only remedy in such a case was a special action on the case. We find such an action in the reports as early as 1461,[1] the propriety of the action being taken for granted by both counsel and court.

If, again, after impairing the value of the goods, the bailee or other possessor refused to deliver them to the owner on request, detinue would of course lie. But the judgment being that the plaintiff recover his goods or their value with damages for the detention,[2] if the defendant saw fit to restore the goods under the judgment, the plaintiff would still have to resort to a separate action on the case in order to recover damages for the injury to the goods. This was pointed out by Catesby in an early case,[3] and later by Serjeant Moore.[4] To prevent this multiplicity of actions, the plaintiff was allowed to bring an action on the case in the first instance, and recover his full damages in one action.

If a bailee destroyed the chattel bailed, the bailor, as we have seen, could recover its value in detinue. But if a possessor other than the owner's bailee destroyed the chattel, if, for instance, the tun of wine which Brown and his "*bons compagnons*" drank up, in the case already mentioned, had come to the hands of Brown in some other way than through bailment by the owner, it is at least doubtful if the owner could have recovered the value of the wine in detinue. Brown, in this case, never agreed with the owner to give up the wine on request. The plaintiff in detinue must therefore show a

[1] Y. B. 33 Hen. VI. f. 44, pl. 7. See also Y. B. 9 Hen. VI. f. 60, pl. 10; Y. B. 2 Ed. IV. f. 5, pl. 9, per Littleton; Y. B. 12 Ed. IV. f. 13, pl. 9; Rook *v.* Denny, 2 Leon. 192, pl. 242.

[2] See Williams *v.* Archer, 5 C. B. 318, for the form of judgment in detinue.

[3] Y. B. 18 Ed. IV. f. 23, pl. 5: "If I deliver my clothes to you to keep for me, and you wear them so that they are injured, I shall have an action of detinue, . . . and afterwards an action on the case for the loss sustained by your using the clothes."

[4] (1510) Keilw. 160, pl. 2.

detention, which would be impossible of goods already destroyed. This was the view of Brian, C. J. This conservative judge went so far, indeed, as to deny the owner an action on the case under such circumstances, but on this latter point the other justices were "*in contraria opinione.*"[1]

If case would lie against any possessor for misusing goods of another, and also against a possessor other than a bailee for the destruction of the goods, it was inevitable that it should finally be allowed against a bailee who had destroyed the goods. Such an action was brought against the bailee in a case of the year 1479,[2] which is noteworthy as being the earliest reported case in which a defendant was charged with "converting to his own use" the plaintiff's goods.[3] Choke, J., was in favor of the action. Brian, C. J., was against it. Choke's opinion prevailed.[4]

Later, a wrongful sale was treated as a conversion. In 1510 the judges said an action on the case would lie against a bailee who sold the goods because "he had misdemeaned himself."[5] In a word, trover became concurrent with detinue in all cases of misfeasance.

Trover also became concurrent with trespass. In 1601 the Court of King's Bench decided that trover would lie for a taking.[6] In the same year the Court of Common Pleas was equally divided on the question, but in 1604, in the same case, it was decided, one judge dissenting, that the plaintiff might have his election to bring trespass or case.[7] The

[1] Y. B. 12 Ed. IV. f. 13, pl. 9. See also Y. B. 9 Ed. IV. f. 53, pl. 15, per Billing, J.

[2] Y. B. 18 Ed. IV. f. 23, pl. 5.

[3] The allegation of conversion occurs again in Y. B. 20 Hen. VII. f. 4, pl. 13; Y. B. 20 Hen. VII. f. 8, pl. 18; Mounteagle *v.* Worcester (1556), Dy. 121 a. The earliest precedents using the words "converted to his own use" are in Rastall's Entries, 4, d, pl. 1 (1547). Ibid. 8, pl. 1. In the reign of Elizabeth it was common form to count upon a finding and conversion.

[4] Y. B. 18 Ed. IV. f. 23, pl. 5; Y. B. 27 Hen. VIII. f. 25, pl. 3. "It is my election to bring the one action or the other, *i. e.*, detinue or action on my case at my pleasure."

[5] Keilw. 160, pl. 2. To same effect, Vandrink *v.* Archer, 1 Leon. 221, a sale by a finder. The judges thought, however, that an innocent sale would not be conversion. But this *dictum* is overruled by the later authorities. Consol. Co. *v.* Curtis, [1892] 1 Q. B. 495; 1 Ames & Smith, Cases on Torts, 328, 333, n. 4.

[6] Basset *v.* Maynard, 1 Roll. Ab. 105 (M), 5.

[7] Bishop *v.* Montague, Cro. El. 824, Cro. Jac. 50.

Exchequer gave a similar decision in 1610.[1] In 1627, in Kinaston *v.* Moore,[2] "semble per all the Justices and Barons, . . . although he take it as a trespass, yet the other may charge him in an action upon the case in a trover if he will."

In all these cases the original taking was adverse. If, however, the original taking was not adverse, as where one took possession as a finder, a subsequent adverse holding, as by refusing to give up the goods to the owner on request, made the taker, according to the early authorities cited in the first part of this paper,[3] a trespasser *ab initio*. Trover was allowed against such a finder in 1586, in Eason *v.* Newman,[4] Fenner, J., citing the opinion of Prisot, C. J., that the owner could maintain trespass in such a case.

That trover was allowed in Eason *v.* Newman as a substitute for trespass, and not as an alternative of detinue, is evident, when we find that for many years after this case trover was not allowed against a bailee who refused to deliver the chattel to the bailor on request. The bailee was never liable in trespass, but in detinue. In 1638, in Holsworth's Case,[5] an attempt to charge a bailee in trover for a wrongful detention was unsuccessful, as was a similar attempt nine years later in Walker's Case,[6] "because the defendant came to them by the plaintiff's own livery." A plaintiff failed in a similar case in 1650.[7] In the "Compleat Attorney,"[8] published in 1666, we read: "This action (trover) properly lies where the defendant hath found any of the plaintiff's goods and refuseth to deliver them upon demand; or where the defendant comes by the goods by the delivery of any other than the plaintiff." But in 1675, in Sykes *v.* Wales,[9] Windham, J., said: "And so trover lieth on bare demand and denial against the bailee."

By these decisions trover became concurrent with detinue

[1] Leverson *v.* Kirk, 1 Roll. Ab. 105 (M), 10.
[2] Cro. Car. 89.
[3] *Supra*, 429.
[4] Goldesb. 152, pl. 79; Cro. El. 495, s. c.
[5] Clayt. 57, pl. 99.
[6] Clayt. 127, pl. 227.
[7] Strafford *v.* Pell, Clayt. 151, pl. 276.
[8] p. 86.
[9] 3 Keb. 282. See also Scot and Manby's Case (1664), 1 Keb. 449, per Bridgman.

in all cases, except against a bailee who could not deliver because he had carelessly lost the goods.[1] Indeed, trover in practice, by reason of its procedural advantages, superseded detinue until the present century.[2]

Although trover had now made the field of detinue and trespass its own, there was yet one more conquest to be made. Trespass, as the learned reader will remember, would not lie, originally, for a wrongful distress, the taking in such a case not being in the nature of a disseisin. In time, however, trespass became concurrent with replevin. History repeats itself in this respect, in the development of trover. In Dee *v.* Bacon,[3] the defendant pleaded to an action of trover that he took the goods damage feasant. The plea was adjudged bad as being an argumentative denial of the conversion. Salter *v.* Butler[4] and Agars *v.* Lisle[5] were similar decisions, because, as was said in the last case, "a distress is no conversion." The same doctrine was held a century later in two cases in Bunbury. But in 1770, in Tinkler *v.* Poole,[6] these two cases, which simply followed the earlier precedents, were characterized by Lord Mansfield as "very loose notes," and ever since that case it has been generally agreed that a wrongful distress is a conversion.

This last step being taken, trover became theoretically concurrent with all of our four actions, appeal of larceny, trespass, detinue, and replevin, and in practice the common remedy in all cases of asportation or detention of chattels or of their misuse or destruction by a defendant in possession. The career of trover in the field of torts is matched only by that of assumpsit, the other specialized form of action on the case, in the domain of contract.

The parallel between trover and assumpsit holds good not

[1] Even here the bailee was chargeable in case, *i. e.* assumpsit.

[2] In 1833, the defendant in detinue lost his right to defend by wager of law, and by the Common Law Procedure Act of 1854, c. 78, the plaintiff gained the right to an order for the specific delivery of the chattel detained. Under the influence of these statutory changes, detinue has regained some of its lost ground.

[3] Cro. El. 435.

[4] Noy, 46.

[5] Hutt. 10.

[6] 5 Burr. 2657.

[7] 1 Ames & Smith, Cases on Torts, 274, n. 3.

only in the success with which they took the place of other common-law actions, but also in their usurpation, in certain cases, of the function of bills in equity. A defendant who has acquired the legal title to the plaintiff's property by fraud or duress, is properly described as a constructive trustee for the plaintiff. And yet if the *res* so acquired is money, the plaintiff may have an action of assumpsit for money had and received to his use; and if the *res* is a chattel other than money, the plaintiff is allowed, at least in this country, to sue the defendant in trover.[1] In some cases, indeed, an express trustee is chargeable in trover, as where an indorsee for collection refuses to give back the bill or note to the indorser. Lord Hardwicke, it is true, had grave doubts as to the admissibility of trover in such a case;[2] but Lord Eldon reluctantly recognized the innovation.[3] This innovation, it should never be forgotten, was a usurpation. Trover as a substitute for a bill in equity is, and always must be, an anomaly.

[1] Thurston *v.* Blanchard, 22 Pick. 18; 1 Ames & Smith, Cases on Torts, 287, 288, n. 2.

[2] *Ex parte* Dumas, 2 Ves. 583.

[3] *Ex parte* Pease, 19 Ves. 46: "If the doctrine of those cases is right, in which the court has struggled upon equitable principles to support an action of trover, these bills might be recovered at law; but there is no doubt that they might be recovered by a bill in equity."

65. THE HISTORY OF THE LAW OF DEFAMATION [1]

By Van Vechten Veeder [2]

IF the laws of each age were formulated systematically, no part of the legal system would be more instructive than the law relating to defamation. Since the law of defamation professes to protect personal character and public institutions from destructive attacks, without sacrificing freedom of thought and the benefit of public discussion, the estimate formed of the relative importance of these objects, and the degree of success attained in reconciling them, would be an admirable measure of the culture, liberality, and practical ability of each age. Unfortunately the English law of defamation is not the deliberate product of any period. It is a mass which has grown by aggregation, with very little intervention from legislation, and special and peculiar circumstances have from time to time shaped its varying course. The result is that perhaps no other branch of the law is as open to criticism for its doubts and difficulties, its meaningless and grotesque anomalies. It is, as a whole, absurd in theory, and very often mischievous in its practical operation.

Nevertheless, the existence of any body of legal rules is at least *prima facie* ground of justification. Some, it may be, are wholly pernicious; but they must have had some origin, and the longer they have existed the greater is the

[1] This Essay was first published in the Columbia Law Review, 1903-1904, Vol. III, pp. 546-573, Vol. IV, pp. 33-56, and has been revised by the author for this Collection. The second part of the original essay, commenting on the theory and policy of the present law, is here omitted.

[2] A biographical sketch of this author is prefixed to Essay No. 20, in Volume I of this Collection.

presumption that they have some utility. They can be accounted for only by discovering the special circumstances out of which they arose, and the forces to which they have been exposed. By studying the way in which they have grown, and the functions which they have discharged, we can best arrive at a sound conclusion concerning their real nature and value.

Early in the middle ages reputation was amply protected in England by the combined secular and spiritual authorities. In the course of the nationalization of justice by the king's judges the jurisdiction of the seignorial courts fell into decay; and, after a long and bitter struggle, the jurisdiction of the ecclesiastical courts was also absorbed by the royal tribunals. When, however, the king's courts acquired jurisdiction over defamation, during the latter half of the sixteenth century, various social and political conditions combined to contract the actionable right, or remedy. The king's courts granted only a limited remedy, the selection being based partly upon the character of the imputation, partly upon the consequences resulting therefrom; moreover, even this limited remedy was little concerned in theory with the right to reputation as such. By reason of its growth in this way the early common law of defamation consisted merely of a series of exceptions to entire license of speech. When, at length, early in the seventeenth century, the potentialities of the printing press dawned upon the absolute monarchy, the emergency was met, not by further additions to the list of actionable imputations, but by a direct importation of the Roman law, without regard to Roman limitations, and with certain additions adapted to the purpose in hand. This special provision for written or printed defamation, first adopted in the criminal law, eventually became also a principle of civil judicature. In this way a new principle of actionable defamation, based upon mere form, was introduced in the law. The original common law doctrine of defamation, based upon the nature of the imputation, became stereotyped as the law of spoken defamation, or slander; the doctrine inherited from Roman law, through the Star Chamber, became the law of written

and printed defamation, or libel.[1] The English law of defamation, therefore, was first limited by a process of selection, and then confused by a formal distinction which is not only unknown in other systems of law,[2] but is also wholly accidental in origin and irrational in principle.

The beginnings of the law of defamation among the Germanic people take us back to the first stages in the development of organized society. The blood feud had supplanted indiscriminate vengeance, but the substitution of the *wer*, or money payment, as compensation for injury, was not very old when the early *Leges Barbarorum* were compiled. The process is very clearly marked in the case of defamation. The Lex Salica is much concerned with foul language. If one calls a man "wolf" or "hare" he must pay three shillings; for a false imputation of unchastity against a woman the penalty is forty-five shillings.[3] By the terms of the Nor-

[1] Mr. Frank Carr suggests, in his admirable article on defamation in the Law Quarterly Review, xviii, 255, 388, that in this respect we are sharing to some extent the fate of the Roman contractual system; formal in character, but with some contracts privileged to be formless. And the measure of the comparative failure of the Roman contractual system, as contrasted with contract, as interpreted by the doctrine of consideration, is the measure of the inadequacy of our law of defamation.

[2] The principles of Roman law lie at the basis of most of the foreign systems of law. In the principal continental systems there is no fundamental distinction as to right of action between written and spoken defamation. The penalty may be (in Germany always is) higher in the case of writing, but the cause of action is the same. In the civil action, as a rule, only actual damages can be recovered. The defamer is punished by concurrent criminal actions, in which the penalties are heavier when the defamation was public (also, in Germany, when it can be shown that the defendant knew his statements were false). The truth is not always a defence. In the case of defamatory statements published in newspapers, French law admits proof of truth only when the statements refer to official acts. In German law the truth is regularly admitted; but it does not avert punishment in criminal actions if the statement was made in an insulting manner. By the law of Scotland every defamatory statement, without regard to the form in which it is made, is actionable. The elements of the offence are the injury sustained and the insult for which solatium is due. The common law distinctions are likewise unknown in Louisiana.

Prof. Munroe Smith gives a lucid sketch of the foreign law in the Universal Encyclopedia, tit. Libel and Slander, together with a bibliography of the foreign law. See also Stephen, Hist. of the Criminal Law, ii, 387 *et seq.;* 10 Law. Quar. Rev., 160; Encyclopedia of Scotch Law, tit. Defamation; Aiken *v.* Reat, 7 Murrell (Sc.) 149; Louisiana Civil Code, Art. 2315, and Session Laws of 1888, No. 118.

[3] Lex Salica, tit. 30 (Hessels and Kern, col. 181).

man Costumal if one falsely calls another "thief" or "manslayer" he must pay damages, and, holding his nose with his fingers, must publicly confess himself a liar.[1] It is a mistaken idea, therefore, to suppose that the primitive Teuton could feel only blows, and treated hard words of no account. Many forms of expression which in a civilized community would be regarded as violent abuse doubtless passed for common pleasantry, but reputation was dear to him and shame was keenly felt. Indeed, a good reputation was a defence to almost every crime.[2]

More than a thousand years ago King Alfred provided that the slanderer should have his tongue cut out, unless he could redeem it with the price of his head.[3] The oldest English laws exact *bot* and *wite* of those who give bad names. The earliest records of pleadings in the local courts indicate the prevailing sensitiveness; disgrace or dishonor is one of the elements in almost every cause of action. If the defendant had beaten the plaintiff, this was done to the plaintiff's damage to the amount of so many shillings, and to his dishonor (*vituperium*, *dedecus*, *pudor*, *huntage*) to the amount of so many shillings more.[4]

Actions for defamation were common in the seignorial courts in the thirteenth and fourteenth centuries.[5] Many would doubtless resort to the duel, but for the mass of humble folk these courts probably did substantial justice.

[1] Ancienne Coutume, Cap. 76 (ed. de Gruchy, 197). Inasmuch as these penalties were regarded as compensation to the wronged individual, in exchange for his older right of private vengeance, there is a tendency to make the penalty correspond to the degree of irritation which the wrong would naturally excite. Thus, in early Icelandic law, the man accused of cowardice had the right of slaying his accuser. Prof. Munroe Smith in Univ. Enc., tit. Libel and Slander.

[2] Pollock and Maitland, Hist. of English Law, ii, 535, 536.

[3] Quadripartitus (ed. Liebermann, 67); Wilk., Leg. Ang. Sax., 41. The laws of Edgar and Canute are to the same effect. *Ib.* 64, 136.

[4] Pollock and Maitland, ii, 536.

[5] Select Pleas in Manorial Courts (Selden Soc. Pub.), 19, 36, 82, 95, 109, 116, 143, 170; The Court Baron (Selden Soc. Pub.), 48, 57, 61, 125, 133, 136. Cf. Prof. Maitland in Green Bag, ii, 5, 6, particularly his instructive extract from a hypothetical case found in a book of precedents for pleadings in manorial courts. The manorial rolls indicate that the defendant might allege that his words were true. Select Pleas in Manorial Courts, 82. Thus early slander is said to have been uttered of malice aforethought, and sometimes the plaintiff alleges special damage. Pollock and Maitland, ii, 536.

The manorial rolls show the operation of a jurisdiction sufficiently certain and severe to curb defamation of the baser sort. In these local courts the smirched reputation would be cleared before the very persons in whose presence it had been reviled. So that even at a later day when the king's courts were well established, they do not deal with defamation; for such wrongs the humbler subjects sought their remedy in the more familiar, cheaper, and perhaps more trusted, local courts. When, at length, late in the sixteenth century, actions for defamation became common in the king's courts, the manorial courts were in their decay.[1]

Meanwhile the Church punished defamation as a sin. Throughout Europe in the middle ages a great government existed, independent of the separate states; the temporal government was local, but there was a spiritual jurisdiction which was universal. From its humble beginnings in the efforts of the early Christian churches to persuade the faithful to lay their differences before their pastors, a jurisdiction had been evolved, through the canons established by the great councils during the fourth and fifth centuries, which had grown into a mighty system. It outgrew its foster-mother, the Roman law, and throughout Europe challenged the secular authority. From the ninth century to the close of the middle ages, the most autocratic monarch of Western Europe would not have dreamed of denying the authority of the canon law. It had its own tribunals, its own practitioners, its own procedure; it was a very real and active force in men's lives.[2] Indeed, monopolizing learning, as they did, the clergy, as individuals, were indispensable in the social life of the people; and, as an organized caste, the Church, in the performance of its professed duty to support the right and to protect the weak, had grasped the regulation of nearly everything that concerned the peaceful occupations of life.[3]

The demarcation of the real province of this ecclesiastical jurisdiction was a difficult task. The Church claimed and

[1] Law Quar. Rev., xviii, 264-267.
[2] Jenks, Law and Politics in the Middle Ages, 29.
[3] N. St. John Green in Am. Law Rev., vi, 595.

exercised jurisdiction, as of a spiritual nature, not alone over matters of ecclesiastical economy, but over matrimonial and testamentary causes and pledges, and was with difficulty prevented from appropriating the greater part of the province of contract. But its broadest claim was the correction of the sinner for his soul's health. Under this head, along with the whole province of sexual morality, usury, and perjury came defamation. Contumelious words were among the various matters which had been embraced in Roman law under the title "*injuria*." *Injuria*, in its legal acceptation, meant insult; but it was more comprehensive than the modern significance of the word. A person was insulted in many ways by direct force, as by assault and battery; or without direct force, as by shouting after him in the street so as to cause a crowd to follow him. Reproachful language which lessened one's good fame was also an injury; and this class of injuries grew in ecclesiastical law into the distinct title "*diffimation*." The Church, then, being answerable for the cleanliness of men's lives, stayed the tongue of the defamer at once *pro custodia morum* of the community, and *pro salute animæ* of the delinquent. The usual ecclesiastical penance for the offence was an acknowledgment of the baselessness of the imputation, in the vestry room in the presence of the clergyman and church wardens of the parish, and an apology to the person defamed.[1]

William the Conqueror did not question the ecclesiastical jurisdiction. At the conquest all the tribunals were presided over by ecclesiastics, and for nearly a century thereafter many of the king's judges were ecclesiastics. The Conqueror simply separated the ecclesiastical from the civil jurisdiction by a historic ordinance commanding that no bishop or archdeacon should thereafter hold pleas relative to ecclesiastical matters, as theretofore, in the county court. Shortly afterwards, however, the rivalry between the secular

[1] For the canon law in general see the luminous chapter in Pollock and Maitland, i. 88. With particular reference to defamation, see the very learned article on slander and libel by N. St. John Green in American Law Rev., vi, 593; also Law Quar. Rev., xviii, 267 *et seq.* Mr. Carr points out the curious anticipation of the punishments suggested by Bentham.

and spiritual jurisdictions began. One of the first limits put upon the Church's pretensions to punish sin was the requirement that if the sin was also an offence which the temporal courts could punish, the spiritual judges were not to meddle with it. The first statute in which defamation is mentioned dates from the thirteenth year of Edward I. In specifying certain cases "wherein the king's prohibition doth not lie," it was provided: "And in cause of defamation it hath been granted already that it shall be tried in a spiritual court where money is not demanded."[1] That is, the temporal and spiritual courts would seem to have divided the cause of action, the forum depending upon whether money was demanded. This line of demarcation becomes very significant in after times; but apparently it bore no immediate fruit, for it is long before we find actions of defamation in the king's courts. Indeed, as soon afterwards as the ninth year of Edward II it was enacted that corporal penance in defamation might be commuted for a money payment, "the king's prohibition notwithstanding."[2] A statute of the succeeding reign, limiting the exercise of the spiritual jurisdiction so as not to deter from the prosecution of the offenders before the king's justices,[3] points the other way, and presages the long and bitter struggle between Church and State over the administration of justice.

Apart from the growing power of the king's courts, the tyranny and corruption of the ecclesiastical courts had, long before the Reformation, aroused a very strong feeling of antipathy. Their inquisitorial procedure was little calculated to commend itself. Most of the cases were instigated by the obnoxious apparitors attending the various courts, who gathered in the gossip of the day, and retailed it to the court as a ground for denunciation and prosecution.[4] Then, too, it is surprising that injured persons should have been content so long with the very limited satisfaction of seeing their

[1] 13 Edward I, c. 1.
[2] 9 Edward II, c. 4.
[3] Edward III, c. 11.
[4] See English Political Songs (Camden Soc. Pub.), 155; Chaucer's reference to the Sompnour in the Prologue to the Frere's Tale. Law Quar. Rev., xviii, 268, 269.

defamers doing penance in a white sheet.[1] These considerations doubtless contributed towards the ultimately successful aggression of the king's courts. Before the Commonwealth the jurisdiction of the Church had been crippled.[2] It survived in theory without any adequate means of enforcement,[3] and was finally abolished altogether in the second decade of Victoria's reign.[4]

Archdeacon Hale's Precedents include a number of interesting causes of defamation during the period from 1475 to 1610. Out of some seven hundred causes collected, about six per cent concern defamation. As may be inferred from the fact that the vast majority of the cases collected relate in one way or another to sexual immorality, the majority of the slanders alleged are those which impute this offence.[5] In three cases the defamation was in writing, but no distinction seems to have been taken on that ground; in one of the later cases it is expressly declared that no distinction is to be taken as to mere form.[6]

While as yet the bulk of the nation found a remedy for defamation in the seignorial and ecclesiastical courts, there was still another jurisdiction, during part of this time, open to a limited aristocracy, official or otherwise, and administered by the king's council. This was the statutory offence known as *De Scandalis Magnatum*. The original statute, enacted in 1275, provided:

> "Whereasmuch as there have been afore times found in the country devisers of tales . . . whereby discord or occasion of discord hath arisen between the king and his people or great men of this realm . . . it is commanded that none be so hardy as to tell or publish any false news or tales whereby discord or occasion of discord or slander may grow between the king and his people or the great men of the realm; he that doth so shall be taken and kept in prison until he hath brought him into the court which was first author of the tale."[7]

[1] Green Bag, ii, 4. [2] 16 Charles I, c. 4.
[3] 13 Charles II, c. 12, s. 4. The limitations of the surviving jurisdiction appear in Crompton *v.* Butler (1790) 1 Haggard 460.
[4] 18 & 19 Vic., c. 41.
[5] Law Quar. Rev., xviii, 270-272.
[6] Ware *v.* Johnson (1755) 2 Lee 103.
[7] 3 Edward I, c. 34; Statutes at Large, i. 97. A later statute particularizes the "great men of the realm": "Prelates, Dukes, Earls,

A subsequent act in the reign of Richard II recites the former act against "devisers of false news and of horrible and false lies, of prelates, dukes, earls, barons, and other noble and great men of the realm, whereby great discord hath arisen, and whereof, great peril and mischief might come to all the realm, and quick subversion and destruction of the said realm, if due remedy be not provided," and then continues:

"It is accorded and agreed in this Parliament that when any such deviser is taken and imprisoned and cannot find him by whom the speech is moved, as before is said, that he shall be punished by the advice of the said council, notwithstanding the said statutes."[1]

These statutes were construed with the generous comprehensiveness which characterized the activities of the king's council.[2] The criminal remedy was enforced by the council, sitting, according to Crompton, in the "starred chamber." Although the statutes had also a civil aspect, the civil remedy was seldom used. The last action under these statutes was in 1710; but they were formally repealed only in recent times.[4]

The action *De Scandalis Magnatum* was of little importance in itself, but in its tendency and ultimate consequences it had a very significant bearing upon the law of defamation. Protecting none but the great men of the realm who, on account of their noble birth or official dignity, could not or would not demean themselves either by personal encounter or by resort to any other jurisdiction than that of their sovereign, these statutes are hardly to be taken as a recognition by the royal authority of the right to reputation. They were

Barons, and great men of the realm, and also of the Chancellor, Treasurer, Clerk of the Privy Seal, Steward of the King's House, Justices of the one bench or the other, and of other great officers of this realm. 2 Richard II, c. 5.

[1] 12 Richard II, c. 11; Statutes at Large, ii, 305.

[2] See Lord Townsend *v.* Dr. Hughes, 2 Mod. 150.

[3] The first civil action was brought more than one hundred years after the date of the last statute defining the offence. 10 Rep. 75. Lord Townshend *v.* Dr. Hughes, 2 Mod. 150.

[4] Statute Law Revision Act, 50 & 51 Vic., c. 59 (1887).

in fact directed rather against sedition and turbulence than against ordinary defamation. We know from their context and from contemporaneous history that their immediate cause is to be found in the plain speaking and homely wit of the Lollard rhymes current in the days of the peasants' revolt. The political songs current in the Plantagenet times sounded the voice of the people in public affairs. Indeed, for centuries the song and ballad writers were the only spokesmen of the people in political affairs. It was they who gave voice to popular criticism, discontent and rejoicing, in a form, moreover, in which every mood of passion was embodied with a condensation of force and feeling to which the raillery of sadness of music added its own significance. It was with reference to such a time that one can appreciate the force of Fletcher's well-known sentiment that the making of the people's songs is a greater influence than the making of their laws.

The significance of the action *De Scandalis Magnatum* is, then, that it was directed against political scandal, and that the law was administered in the Star Chamber. This cognizance of defamation considered as a political and criminal offence was repeatedly confirmed, and as to particular cases, extended by subsequent statutes. It was a familiar jurisdiction, and one which constantly grew with exercise. Hence it is not surprising to find that by the time of Elizabeth the Star Chamber had assumed jurisdiction of cases of ordinary or non-political defamation, which it decided in the way of criminal proceedings. There was indeed, a measure of justification for this course. The duel was still a common method of vindication among those who did not come within the terms of the statutory remedy. Now the Star Chamber made every effort, in the interest of the public peace, to suppress duelling.[1] But it might well feel that it was idle to prohibit this ancient remedy and offer no substitute. Therefore it

[1] In 1613 James I issued a royal edict against duelling, and this was supplemented in the following year by a Star Chamber decree on the same subject. From this time on the courts waged a continuous hostility to the duel in all its forms; they refused to regard it as in any way an affair of honor, but held it to be an unlawful assembly in an aggravated form.

took cognizance of both political and non-political defamation in the interests of public tranquillity.[1]

Finally we come to the king's courts of common law, which, prior to the reign of Elizabeth, practically gave no remedy for defamation. This fact is, of course, at variance with modern ideas, according to which the administration of justice is regarded as the inevitable and exclusive function of the state. But a glance at the condition of Europe in the middle ages will show that state justice was then very feeble. Men were judged by their lords, by their fellow burghers, by their priests, but they were seldom judged by the state. In England the jurisdiction of the state grew more rapidly than elsewhere. The development of the system of writs, by means of which the king's justices built up the jurisdiction of the royal courts, practically ceased with Henry III; henceforth judicial legislation proceeded only by the slow stages of decision and precedent. Edward I, however, carried on the process with a new conception. Law had been declared by kings, by landowners, by folks, by judges, by merchants, by ecclesiastics. By combining all these forces in legislation we get a law which is stronger, better, and more comprehensive than the separate laws which preceded it. For more than two centuries this conception of national law found a serious rival in the canon law, but with the Reformation the modern idea of law was realized.[2]

For the statement that pleas of defamation were not entertained in the king's court we have express authority. The earliest mention of the offence in this jurisdiction occurs in a picturesque dispute between two Irish magnates, which had been removed in 1295 to Westminster, where the whole process was annulled for errors, foremost among which was the fact that the case had begun with a charge of defamation — "and it is not used in this realm that pleas of defamation should be pleaded in the king's court."[3] The silence of the Year Books and of the Abridgments confirm this statement.

[1] Law Quar. Rev., xviii, 391. For a further account of this jurisdiction, see Carr, *supra*, 260-263, and Odgers, Digest of Libel and Slander, ch. Iv, where the cases are cited.

[2] Jenks, Law and Politics in the Middle Ages, 43, 44.

[3] Rot. Parl., i, 133; Green Bag, ii, 4.

In the Year Books, from the first year of the reign of Edward III to the last year of Henry VIII, a period of two hundred and twenty years, there are in all only ten cases of defamation; one in the time of Edward III, three under Edward IV, one under Henry VII, and five under Henry VIII. The oldest Abridgments, Statham's (1494) and Fitzherbert's (1563), do not mention the '*action sur le cas pur parolx*'; and Brooke's Abridgment (1573) contains only two paragraphs under this head.[1] This brings us to the reign of Elizabeth, which marks a turning point.

The king's courts, then, did not usually entertain such actions. But, as already shown, this denial of a remedy in the king's courts was no denial of a right. There were other courts where reputation was defended. Only as the old local courts fell into decay did denial of a remedy at Westminster come to be a denial of a right. This may serve to explain the few instances in which, in early times and under exceptional circumstance, we do come across the action in the king's courts. The fact that when the action does first appear it is in the form of a special action on the case is quite conclusive that there was no remedy at common law prior to the statute of Westminster the Second. Prior to that time the right was probably adequately protected by the seignorial courts. When however, these local courts had fallen into decay, the question of royal jurisdiction would become more important. But by that time the task was not an easy one. The time had passed when a new form of action could be created without statute, which made it necessary to discharge the new function by means of an action on the special case for words, under the statute of 13 Edward I.[2]

[1] Holt on Libel 23; Law Quar. Rev., xviii, 388. According to Mr. Carr these few cases are unimportant. The earliest case, from the Year Books, was complicated with contempt of court. Of the two latest, from Brooke's Abridgment, the first was to the effect that a charge of being a "hereticke or advowterer" was actionable only in a spiritual court, while for calling one a bawd an action lay in both courts. The second holds that an action would lie for calling a man a "theefe." See also the entry from the Exchequer roll of 1265 in Prynne's Animadversions on Coke's Fourth Institute, 58; Pollock and Maitland, ii. 535.

[2] Prof. Maitland in Green Bag, ii, 7; The Court Baron (Selden Soc. Pub.), 116.

The principal difficulty doubtless arose from the fact that the ecclesiastical courts, having from remote times corrected the slanderer for his soul's health, had, owing to the decay of the local courts, come to be regarded as having, in some measure, an exclusive right to deal with defamation. The statute *Circumspecte agatis*, passed in the same year as the statute of Westminster the Second, is an indication of the demand, which had even then become pronounced, that more definite bounds should be set to the ecclesiastical jurisdiction. But the Church strenuously resisted all such attempts. The common law courts resorted to prohibitions. The ecclesiastical courts, on their side, wielded the powerful weapon of excommunication. The protracted struggle has ended in the complete victory of the secular jurisdiction only in our own day. The law of defamation, in common with most of the other subjects originally within the spiritual jurisdiction, still bears the scars of this contest, and some of its doctrines can be explained in no other way.

However acquired, cases of defamation begin to appear in the king's courts soon after the last Year Books. During the reigns of Elizabeth, James I, and Charles I, the reports teem with such cases, and the bulk of litigation in defamation at once assumed very large proportions.

It was during this period that the rules of actionability were formulated which in aftertimes came to be applied exclusively to oral defamation. There was as yet, of course, no distinction at common law between slander and libel. The law thus evolved by no means covered all defamatory words; only certain specific imputations were actionable. The principle of selection was founded partly upon the character of the imputation, partly upon the consequences arising from it. The exceptions to unbridled license of speech founded upon the nature or substance of the charge were: imputations of an indictable offence or crime; imputations of having certain contagious disorders, i. e., syphilis, leprosy, and the plague; any imputation affecting a man's reputation for skill and address in his business, office, trade, profession, or occupation, which tended to cause his position to be prejudicially affected. The other exception, founded upon consequences,

allowed an action for any imputation which had in fact directly caused special damage.[1]

How the law came to be thus circumscribed is not entirely clear. The conditions under which the common law jurisdiction was acquired — i. e., the struggle with the ecclesiastical courts, and the necessity of exercising jurisdiction through the medium of an action on the special case for words, probably lie at the root of the matter.[2] In a general way the early cases throw some light. Naturally the law seems new and unsettled. The judges assert that many kinds of defamatory imputations are merely spiritual, and as such are within the legitimate province of the courts Christian, while others are strictly temporal. It is curious to find the judges thus early discouraging the action by the application of the most absurd subtleties and refinements. Slanders were construed like legal writs. The judges were guided by the principle which they called *mitior sensus*, according to which language which could by any process of scholastic ingenuity be tortured into a harmless significance went without remedy. The probable explanation of this attitude is the large amount of litigation of this kind, which perhaps biased the judges against the action. Coke expressed the prevailing feeling in Croft *v.* Brown:

> "We will not give more favor unto actions upon the case for words than of necessity we ought to, where words are not apparently scandalous, these actions being now too frequent."[3]

The judges seem to have begun to draw a distinction between words actionable *per se* and those actionable only on proof of special damage in the exercise of a discretionary power of allowing or disallowing actions. Early in the seventeenth century it was stated that

[1] Imputations tending to disinherison come properly under this branch of the law.

[2] Green Bag, ii. 4. But, as Prof. Maitland says, the process is not clear. For instance, we are told that the imputation conveyed by the word "meretrix" is merely spiritual. But it was not so regarded by the local courts in the middle ages. *Ib.* 7.

[3] 3 Bulstrode 167.

"where words spoken do tend to the infamy, discredit or disgrace of the party, there the words shall be actionable."[1]

And nearly a century later Holt observed that

"it was not worth while to be learned on the subject; but whenever words tended to take away a man's reputation he would encourage actions for them, because so doing would much contribute to the preservation of the peace."[2]

But their discretion came at length to be exercised according to fixed rules, and these rules became fixed law.

The conditions and the habits of thought prevailing in early society afford some explanation why it was not imperatively necessary to provide legal redress for slanders and insults of such a nature as to injure the character or hurt the sensibility, unless they were also such as to result in legal damage to the person against whom they were directed. Men were not more courteous by nature or inclination then than now. They were restrained by a code which formed no part of the legal system, but which was nevertheless a very potent instrument. Men could and did avenge themselves without calling in the assistance of the law, and public opinion for centuries sanctioned the "code of honor." But with the progress of civilization it became apparent that dueling was not only foolish and vicious in principle, but a menace to the public peace as well. As the sanction of public opinion was gradually withdrawn, the laws for the preservation of the peace were continually strengthened. But in the final result, the law suppressed the instincts of nature and gave no substitute.[3]

[1] Small *v.* Hammond, 1 Bulstrode 40.

[2] Baker *v.* Pierce, 6 Modern, 23.

[3] A plausible explanation of the method by which the common law courts acquired jurisdiction in defamation, which would also explain the process of selection of actionable words, was advanced by N. St. John Green in the very interesting article to which reference has already been made. (Am. Law Rev., vi, 593, 607 *et seq.*) It was an established principle of law from the time of Bracton that the *accessorium* must come under the same jurisdiction as the *principale;* that is, jurisdiction over a thing drew with it jurisdiction over all things accessory. It was by means of this rule that the court of King's Bench, by the fiction that the defendant was in its custody, and the court of Exchequer, by the fiction of indebtedness to the crown, were enabled to extend their respective jurisdictions over most of the matters originally pertaining exclusively to the Common Pleas. Upon this

Thus stood the law when the rapid development of the art of printing aroused the absolute monarchy to a keen sense of the danger of this new method of diffusion of ideas. In early times libels must have been comparatively rare and harmless: rare because few could write, harmless because

principle the common law courts may have worked in wresting from the spiritual courts jurisdiction over defamation.

Upon this assumption the various classes of actionable words may be explained. Take the accusation of crime. A court of law having jurisdiction of the offence charged for the purpose of punishing the offender, this jurisdiction might well be held to draw after it as an incident the right to investigate the charge for the purpose of compensating the party defamed if the charge was false. But to give this jurisdiction the imputation must be direct — a crime must be charged. One might suffer as much in reputation and pecuniary damage from being called a thievish knave as from being called a thief. But to call one a thievish knave imputes only a disposition to commit a crime, not a crime committed; and as there is nothing to which the jurisdiction of the court can attach, such an accusation is not actionable in the common law courts.

The fact that it is actionable to impute that one is suffering from leprosy, syphilis, or the plague, while it is not actionable to charge a person with having any other disease (and not actionable to impute having had those specified), may be accounted for in the same way. In early times, when a person became afflicted with leprosy he was deemed to be legally dead and lost the privileges of citizenship. The Church took the same view, and, on the day when the sufferer was consigned for life to a lazar-house, performed over him the various solemn ceremonies observed in the burial of the dead. As the leper was subject to the writ *de leproso amovendo,* the accusation of leprosy as well as the accusation of crime might be held actionable, and upon the same ground. Persons suspected of having the plague were likewise removed by law to pest-houses and confined. To account for the charge of having syphilis is more difficult. Whether upon the appearance of this disease, in the fifteenth century, it was regarded as contagious, and so exposed the sufferer to a writ like the writ *de leproso,* or whether the disease was so similar in its outward manifestations to the form of leprosy then prevalent in England, can only be conjectured. It was a disease quite prevalent among the clergy, and there is abundant evidence to show that it was considered no more disgraceful than any other severe disorder.

The earlier cases with respect to defamatory words touching a person in his office or means of livelihood relate almost altogether to the administration of justice. It would not be difficult to bring the slander of a judge within the jurisdiction of the common law courts. Words spoken of an attorney, of which there are several early cases, likewise touch the administration of justice. To call a merchant a bankrupt was to subject him to the statute of bankruptcy, and might be held actionable upon the same principle as the accusation of crime. That pecuniary loss was the gist of the action, or that damage to a man's business would itself furnish a ground of action in a temporal court, appears to be an idea which originated after the ecclesiastical courts had lost their power. It is founded upon the idea that everything relating to money or business is temporal, as pertaining to matters of this world.

few could read. The invention of printing, however, gave a new impulse to composition. Caxton had set up his press at Westminster in 1476, and the art spread rapidly during the sixteenth century. From the very first Church and State alike assumed to control the press, as they had previously regulated the diffusion of manuscripts.

The Church had long suppressed the diffusion of ideas which it deemed pernicious. The first general council of Nice forbade the works of Arius, and subsequent councils had condemned the works of Origen and others. Imperial power co-operated by burning condemned books. But this total destruction of pernicious books was no longer feasible after the invention of printing. The Church endeavored to forestall publication by prohibiting the printing of all works save such as should be first seen and allowed; publications without such license were burned, as before. As this method did not meet with complete success, it was supplemented by indices or catalogues of books, the reading of which by the faithful was prohibited. Such lists were issued in many parts of Europe by sovereigns, universities and inquisitors during the sixteenth century, beginning with that issued by Henry VIII in 1526. Pope Paul IV issued an index in 1559, but the papacy as such took no part in the process until the Council of Trent, the outcome of which was the famous index of Pius IV, in 1564.

In England the censorship of the press passed with the ecclesiastical supremacy to the crown. The censorship became part of the royal prerogative, and the printing of unlicensed works was visited with the most severe punishment. Printing was further restrained by patents and monopolies. The privilege was confined, in the first instance, under regulations established by the Council in Mary's reign, to the Stationer's Company,[1] which had power to seize all other publications; and the number of presses and the whole matter of printing was strictly limited in all its details. Under Elizabeth the censorship was enforced by still more rigorous penalties, including mutilation and death. All

[1] Formed in 1557. It was composed of ninety-seven London stationers and their successors.

printing was interdicted elsewhere than in London, Oxford and Cambridge; nothing whatever was allowed to be published until it had been first "seen, perused and allowed" by the Archbishop of Canterbury or the Bishop of London, except only publications by the queen's printers, appointed for some special service, or by law printers, for whom the license of the chief justices of either bench was sufficient. This was the situation when, at the accession of James I, all these repressive measures were found to be inadequate to suppress the rising tide of public opinion. The theological controversies of the sixteenth century were passing into the political controversies of the seventeenth. New forms of literature had arisen. The heavy folio, written for the learned, was succeeded by the tract and the flying sheet, to be read by the multitude. Some effective regulation was imperative. The forced construction of the various treason statutes was too cumbersome as an instrument of suppression. The civil action for defamation, then in its infancy, was, of course, entirely inadequate.

The task was at length undertaken by the Star Chamber. The character of this tribunal rendered its selection almost inevitable. It was composed of the highest dignitaries of Church and State,[1] and it exercised practically unlimited authority. Formally constituted a court of criminal equity by Henry VII, the Star Chamber's jurisdiction was based upon the theory which had become familiar in the civil law through the operations of the court of Chancery. There were wrongs which could not be effectively remedied by the ordinary courts of law, and which could not be overtaken immediately by legislation. The venerated forms of action did not cover all classes of wrongs and crimes; nor was even-handed justice always administered between the weak and the powerful. It was necessary that there should be a court with the unrestrained power to do substantial justice. The Star Chamber was thus empowered. It disregarded forms; it was bound by no rules of evidence; it sat in

[1] The chancellor, treasurer, lord privy seal, a bishop, a temporal lord, and the two chief justices, or, in their absence, two other judges as assistants. Later the president of the privy council was added.

vacation as well as in term time; it appointed and heard only its own counsel, thereby not being troubled with silly or ignorant barristers, or such as were idle and full of words. Moreover, it was natural that the members of this tribunal should exercise formal jurisdiction over a matter which they had so long attempted in various ways to control, and with the pernicious effects of which they were deeply impressed.

Jurisdiction over this new and alarming form of scandal was assumed, then, by the Star Chamber. What law should govern it? The law administered by the common law courts was of course out of the question. Its researches were quite naturally directed by its ecclesiastical members to that other great system of law in which they had been trained; and, finding it to the purpose, the court boldly imported the Roman criminal law. The new law was first set forth in 1609, in the case *De Libellis Famosis*,[1] as reported by Coke, and, later, was more fully stated by Hudson in his Treatise on the Star Chamber.[2]

Now the Roman law had two sets of provisions for defamation — the comparatively mild law of *injuria*, and the severe provisions of the *libellus famosus*. In early Roman law, as in most primitive systems, verbal injuries were treated as criminal or quasi-criminal offences. The essence of the injury was not the pecuniary loss, which could be compensated by damages, but the personal insult, which must be atoned for — a vindictive remedy which took the place of personal revenge. We find reference, then, first, in the Twelve Tables, to the libellous chant or song, which is the form of defamation obtaining widest currency, and therefore most keenly felt, in early society. This was severely punished as a crime. Minor offences of this nature came under the general conception of *injuria*, which included ultimately every form of direct personal aggression, whether with or without force, which involved insult or contumely.

In later Roman jurisprudence verbal injuries were dealt with in the edict under two heads. The first comprehended

[1] 5 Rep. 125, a.

[2] Chapter XI "Of Libelling," page 100 *et seq.* This treatise was apparently compiled early in the reign of Charles I.

defamatory and injurious statements which were made in a public manner (*convicium contra bonos mores*). The essence of the offence in this case lay in the unwarrantable public proclamation, in the contumely which was offered to a man before his fellow citizens. In such cases the truth of the statements was no justification for the unnecessarily public and insulting manner in which they had been made. The second head included defamatory statements which were made in private. Since the offence in this case lay in the imputation itself, not in the manner of its publication, the truth was a complete defence; for no man had a right to demand protection for a false reputation. The law thus aimed to give ample scope for the discussion of personal character, while it forbade the infliction of needless insult and pain. The remedy for verbal injuries was long confined to a civil action (*actio æstimatio*) for a money penalty, which was estimated according to the gravity of the case, and which, although vindictive in character, included the element of compensation. Imperial legislation subsequently established supplementary criminal actions under which certain kinds of defamation were punished with great severity. These were the *libelli famosi*, particularly epigrams and pasquinades, which, being in their nature anonymous and scurrilous, were regarded as peculiarly dangerous and were visited with severe punishment, whether true or false. The unnecessarily public and offensive manner of their publication (they were generally scattered about the streets) precluded justification.[1]

We find, therefore, a distinction based upon the manner and extent of publication, but none between speech and writing; for the evil song of an early day coincides with the anonymous pasquil of later times in constituting the criminal offence. The crime was not based upon the form of the publication, but upon the character of the matter published, the extent of its diffusion, and its anonymous nature.

[1] Hunter, Roman Law, 20, 148, 149, 1069, citing the provisions of the Institutes and the Digest; Holt on Libel, ch. i; Odgers, Digest of Libel and Slander, 165, 166; Prof. Munroe Smith in Univ. Enc., tit. Libel and Slander; Law Quar. Rev., x, 158; *ib.* xviii, 256, 257.

The Star Chamber, as the title of Coke's case indicates, adopted provisions of the *libellus famosus*. The action arose out of an "infamous libel in verse" by which the Archbishop of Canterbury, deceased, and the then bishop of that diocese, were "traduced and scandalized." The principal "points resolved" were the following:

"Every libel (which is called *libellus, seu infamatoria scriptura*) is made either against a private man, or against a magistrate or public person. If it be a private man it deserves a severe punishment, for although the libel be made against one, yet it incites all those of the same family, kindred or society to revenge, and so tends *per consequens* to quarrels and breach of the peace, and may be the cause of shedding of blood, and of great inconvenience; if it be against a magistrate, or other public person, it is a greater offence; for it concerns not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the king to govern his subjects under him?"

After holding, without citing any authority, that

"a libeller shall be punished either by indictment at the common law, or by bill, if he deny it, or *ore tenus* on his confession in the Star Chamber, and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant, by pillory and loss of his ears,"

the report continues:

"It is not material whether the libel be true, or whether the party against whom it is made be of good or ill fame; for in a settled state of government the party ought to complain for every injury done him in an ordinary course of law, and not by any means to revenge himself, either by the odious course of libelling or otherwise: he who kills a man with his sword in a fight is a great offender, but he is a greater offender who poisons another; for in the one case, he who is openly assaulted may defend himself, and knows his adversary, and may endeavor to prevent it; but poisoning may be done so secretly that none can defend himself against it; for which cause the offence is the more dangerous, because the offender cannot easily be known; and of such a nature is libelling, it is secret and robs a man of his good name, which ought to be more precious to him than his

life, and *difficilimum est invenire authorem infamatoriae scripturae;* and therefore when the offender is known, he ought to be severely punished." [1]

Hudson's treatise begins with a description of the various ways in which a person might be libelled; he adds that the publishers of libels are as severely punished as the makers.

"Therefore, to hear it sung or read, and to laugh at it, and to make merriment with it, hath ever been held a publication in law."

He points out

"one difference, which standeth with the rules of the law and reason, and which, under favor, I have ever conceived to be just. That upon the speaking of words, although they be against a great person, the defendant may justify them as true; as in all actions *de scandalis magnatum,* which are as properly to be sued in the Star Chamber as in any other court, and he shall be there received to make the truth appear. But if he put the scandal writing, it is then past any justification, for then the manner is examinable and not the matter."

The case *De Libellis Famosis* is the formal starting point of the English law of libel. By it a new form of actionable defamation, based upon mere form, was introduced in the law. Apart from the disposition of the authorities to adopt the most stringent methods of suppression, there were some plausible grounds for this new doctrine of criminal libel. It was, of course, aimed directly at printing, although it included writing. Writing had been for centuries so rare an accomplishment that much weight was attached to anything written. Before the invention of printing libels were generally published by scattering papers containing them

[1] After describing the different forms of libel, the report concludes in Coke's usual sententious style with a passage showing that libelling and calumniation is an offence against God. He cites several passages from Scripture, and concludes: "And it was observed that Job, who was the mirror of patience, as appears by his words [Job 30, ver. 7 & 8], became *quodammodo* impatient when libels were made of him; and therefore it appears of what force they are to provoke impatience and contention."

in the streets, or by posting them in public places. Such libels were generally against the government or those in authority. By the Theodosian Code the publication of such libels seems to have been looked upon as treason, and was punished as a high crime. In England such offences were generally brought within the generous scope of the law of treason and sedition. Coke mentions two cases of libels upon private individuals in the reign of Edward III, and in both cases the libeller was criminally punished. Now came a method of dissemination whose potentialities were unlimited, with all the dangers of anonymity, and in a more permanent form than writing. Moreover, seditious libel (and all libels were deemed seditious) is in its nature a sort of attempt, and the Star Chamber applied the doctrine that attempts and conspiracies to do anything unlawful were substantive offences.[1]

But it is apparent that the Star Chamber adopted the Roman law to its own use without regard to Roman limitations and with certain additions of its own, chief among which was the fundamental principle that libel is punishable as a crime because it tends to a breach of the peace. The Roman criminal law was directed against anonymous pasquinades. When, therefore, the Star Chamber sought to apply this law to a publication which was not anonymous, its inapplicability must have been at once pointed out. That this was done is made plain from what Hudson says about two gross errors that have crept into the world concerning libels.

"That it is no libel if the party put his hand unto it; and the other, that it is not a libel if it be true; both which have long been expelled out of this court. For the first, the reason why the law punisheth libels is, for that they tend to raise a breach of the peace, which may as well be done, and more easily, when the hand is subscribed than when it is not. And for the other, it hath ever been agreed, that it is not the matter but the manner which is punishable: for libelling against a common strumpet is as great an offence as against an honest woman, and perhaps more dangerous to the breach of the peace: for as the woman said she would never grieve to have been told of her red nose if

[1] Hudson, Treatise on the Star Chamber, 104, 107.

she had not one indeed, neither is it a ground to examine the truth or falsehood of a libel; for that takes away *subjectum quaestionis,* and determines it to be no libel by admitting the defendant to prove the truth."

This principle of the tendency of libels to a breach of the peace originated with the Star Chamber. It was not only a very shrewd addition to the law, as an instrument of suppression, but there was undoubtedly some semblance of the truth in the statement, as applied to the condition existing prior to the formation of an organized public opinion. While the law developed only through the pressure of outward needs, the statement of an unwelcome truth concerning another did not serve the useful public purpose that it does now because it did not reach the public eye. But it did undoubtedly tend in a semi-civilized state of society to stir the hot blood of those against whom it was made.[1] Moreover, it must be remembered that the preservation of the public peace was still a very difficult and serious matter.

The Star Chamber, then, having taken over jurisdiction of libel with particular reference to discussion of affairs of Church and State, the idea that such libels were crimes and as such past justification, was formally introduced in English law; a tribunal of which common law judges were constituent members, drew a real distinction between spoken and written defamation of a political kind. Through its jurisdiction as a court, and as the representative of the royal prerogative, the Star Chamber was in immediate control of the press during the reigns of James I and Charles I, and suppressed political and religious discussion with the utmost severity. By its famous ordinance of 1637 the matter of printing was regulated anew. The number of master printers was limited to twenty, who were to give sureties for good behavior, and were to have not more than two presses and two apprentices each; and the number of letter founders was limited to four. The penalty for practising the arts of printing, or making any part of a press or other printing materials, by persons disqualified or not appren-

[1] Bishop, Criminal Law, § 921.

ticed thereto, was whipping, the pillory, and imprisonment. Even books which had been once examined and allowed were not to be reprinted without a fresh license, and books brought from abroad were to be landed at London only, and carefully examined by licensers appointed by the Archbishop of Canterbury and the Bishop of London, who were empowered to seize and destroy such as were seditious, schismatical or offensive. Periodical searches of booksellers' shops and private houses were also authorized and enjoined.

Although the Star Chamber was abolished by the Long Parliament in 1640, the judges, the law, and the censorship remained largely the same. By orders of the Long Parliament in 1642 and 1643 the licensing system of the Star Chamber was practically continued. Shortly after the Restoration the licensing system was placed upon a legal basis by statute.[1] This act expired in 1679, and does not appear to have been immediately renewed, although the censorship was continued during the remainder of this reign. Under James II the licensing act was twice renewed by statute,[2] but lapsed finally in 1695. The incorporation of the Star Chamber doctrine of libel into the common law seems to have been coincident with the waning power of the censorship. It is not at all surprising that Restoration judges, imbued with the Star Chamber doctrines, replaced it with an equally efficient weapon. In 1680, less than a year after the expiration of the Restoration statute, Chief Justice Scroggs announced that the judges had twice declared unanimously, when summoned by the King's command to give their opinions as to what should be done to regulate the press, that, besides publications scandalous to the government or to public or private persons, all writers of false news, though not scandalous or seditious, were indictable.[3] Later in this year the same judge repeated this statement in even more comprehensive terms:

[1] 13 & 14 Car. ii, c. 33. This act was limited to two years; but it was continued by 16 Car. ii, c. 8.

[2] 1 Jac. II, c. 17, s. 15. This act was limited to eight years. It was renewed in 1693 for two years.

[3] R. *v.* Harris, 7 How. St. Tr. 927.

"We did all subscribe that to print or publish any newspaper or pamphlet of news whatsoever is illegal; that it is a manifest intent to a breach of the peace. . . . and that is for a public notice to all people, and especially printers and booksellers, that they ought to print no books or pamphlets of news whatsoever without authority." [1]

It is to this juncture that we must look for the creation of that doctrine, first announced in the common law courts by Hale, that although words "spoken once" would not be actionable, "yet they being writ and published" become actionable. The later Roman law of the *libellus famosus* thus become part and parcel of the English common law. The formal distinction was apparently introduced into the civil law by the same process of reasoning that led the Star Chamber to assume cognizance over non-political defamation. The Star Chamber had been abolished; press licensing was waning. How were these non-political, non criminal libels to be restrained if men no longer had the vindication of the duel? The difficulty was met by the creation of a new tort, written defamation.[2]

The civil doctrine of libel was first announced by Lord Chief Baron Hale in King *v.* Lake in the Exchequer, in 1670.[3] There are a few earlier cases in which the defamation was in writing, but on no occasion was this regarded as a title to a remedy if the written matter did not come within recognized exceptions.[4] King was a barrister who claimed to have been "damnified in his good name and credit and profession" by reason of the fact that Sir Edward Lake had written of a petition to Parliament drawn up by King that it was "stuffed with illegal assertions, ineptitudes and imperfections, and clogged with gross ignorances, absurdities and solecisms." Hale held that "although such general words spoken once without writing or publishing them would not be actionable, yet here, they being writ and

[1] R. *v.* Carr, 7 *ib.* 1114. Long afterwards Lord Camden pronounced this resolution of the judges "extra judicial and invalid." Entick *v.* Carrington, 19 How. St. Tr. 1070.

[2] Frank Carr in Law Quar. Rev., xviii, 393, 394. See also J. R. Fisher in Law Quar. Rev., x. 158.

[3] Hardres 470; Skinner 124.

[4] Law Quar. Rev., xviii, 394, 395.

published, which contains more malice than if they had been once spoken, they are actionable." In Harman *v.* Delany,[1] the court held that

> "words published in writing will be actionable (though not so when barely spoken) which would not be so from a bare speaking of the words, because libel perpetuates and disperses the scandal."

From this time on the series of cases establishing the new tort increases. The matter may be said to have been finally determined by the judgment of the Exchequer Chamber in the case of Thorley *v.* Lord Kerry, in 1812.[2] In this very important case the whole subject was ably argued by eminent counsel. Sir James Mansfield, in delivering the judgment of the court, reluctantly admitted that "the distinction has been made between written and spoken slander as far back as Charles the Second's time."

> "I do not now recapitulate the cases," he said in conclusion, "but we cannot in opposition to them venture to lay down at this day that no action can be maintained for words written for which an action could not be maintained if they were spoken. If the matter were for the first time to be decided at this day, I should have no hesitation in saying that no action could be maintained for written scandal which could not be maintained for the words if they had been spoken."[3]

The historical development of actionable defamation has now been traced to the time when the distinction as to form became fixed. Written defamation is libel; spoken defamation is slander. Libel is a crime as well as a tort; slander of a private individual may be a tort, but is no crime. Any written words which injure one's reputation are libellous; but many words which would be actionable if written are not actionable if merely spoken. In the case of slander a

[1] Fitzgibbon 254.
[2] 4 Taunton 355.
[3] For the adoption of the distinction in American law, see Dole *v.* Lyon (N. Y., 1813) 10 Johns. 447; Cooper *v.* Greeley (N. Y., 1845) 1 Denio 347 at 362; Clark *v.* Binney (Mass. 1824) 2 Pick, 113; Colby *v.* Reynolds (1834) 6 Vt. 489.

plaintiff must satisfy the jury that the words spoken impute the commission of a crime, or the presence of certain contagious disorders, or that they disparage him in the way of his office, profession or trade, in all other cases he must prove special damage, that is, that he has sustained some pecuniary loss as a direct consequence of the utterance of the words complained of.

66. RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY[1]

By John Henry Wigmore[2]

Not infrequently do the records of the related laws serve as the sole resource, or the safest one, for a methodical explanation of dark and doubtful topics in the legal development of our own native system.
Brunner: *Deutsche Rechtsgeschichte,* i. 2.

"NO conception can be understood except through its history," says the Positivist philosopher; and of no legal conception in Anglo-American law is this more true than of the notion of Responsibility for Tortious Acts. By this phrase is indicated that circumstance or group of mental circumstances attending the initiation and eventuation of an acknowledged harmful result, which induces us to make one person rather than another (or than no one at all) civilly amenable to the law as the source of the harmful result (and independently of whether this person can show some recognized justification for the harm). It is this notion whose history we find it possible to trace back in a continuous development in our Germanic law, without a break, for at least two thousand years.

To get a starting-point, let us look back from present principles. The law to-day, so far as we are entitled to take it as standing on a rational basis, distinguishes classes of cases which may be roughly generalized for present purposes as follows: (1) Cases where the source of harm is

[1] This Essay first appeared in the Harvard Law Review, 1894, vol. VII, pp. 315, 383, 442, and has been revised and brought down to date by the author for this Collection; most of the quotations from English cases given in the original article, in the second and third parts, have been here omitted.

[2] A biographical note of this author is prefixed to Essay No. 40, in Volume II of this Collection.

pure misadventure, as where a customer is handling a supposed unloaded gun in a gun-store, and it goes off and injures the clerk; (2) Cases where no design to injure exists, but a culpable want of precaution and foresight is found; (3) Cases where no design to injure exists, and yet no inquiry into the actor's carefulness is allowed, — in other words, where he does the specific harm-initiating act "at his peril," as where he fires a gun in the street, or sells goods which prove to be those of another; (4) Cases where actual design to produce the harm exists.[1] Now, the thing to be noted is that the primitive Germanic law knew nothing of these refinements; it made no inquiry into negligence, and it based no rule on the presence or absence of a design or intent; it did not even distinguish, in its earlier phases, between accidental and intentional injuries. The distinctions of to-day stand for an attempt (as yet more or less incomplete) at a rationalized adjustment of legal rules to considerations of fairness and social policy. But the indiscriminate liability of primitive times stands for an instinctive impulse, guided by superstition, to visit with vengeance, the visible source, whatever it be, — human or animal, witting or unwitting, — of the evil result. Both these extremes are fairly clear; it is the transition from one notion to the other which forms the interesting and complex process.

In endeavoring to realize the nature of the primitive canons of Responsibility, one must take into consideration the essentially superstitious and unreasoning spirit which pervaded the jural doings of primitive society; for the notion here dealt with was only one of the vehicles of his expression. One need not here to call to mind in detail the character-

[1] Compare Holmes, Common Law, cc. iii., iv., esp. pp. 92 ff., 144 ff.; Pollock, Torts, p. 19. It is here assumed, for present purposes, that in the few classes of cases where actual malicious motive is material, no question of responsibility, properly considered, is involved, but rather a question of the loss of a privilege; as pointed out by Mr. Justice Holmes in his article on Privilege, Malice, and Intent (Harvard Law Review, VIII, 1; 1894) and by the present author in an article on the Tripartite Division of Torts (id., VIII, 200, 377; 1894). Professor Whittier, in his article on Mistake in the Law of Torts (id. XVI, 335; 1902) does not accept this analysis.

istics of primitive culture;[1] only certain of the more germane may be noted. The instinct of revenge, as an aggressive reaction from inflicted pain, preceding any developed sense of justice;[2] the prevalence of clan-organization and clan-responsibility;[3] the idea of transgression as associated with ceremonial observances;[4] the implicit belief in taboo and curse;[5] the propitiation of ghosts and deities by gifts and sacrifices;[6] the sense of pollution and contamination (as by the touching of blood or of a corpse);[7] the inheritance of guilt; the appeal to a decision of the Deity or of chance in litigation (as by the subjection to ordeals, the swearing of exculpatory oaths, the engaging in formal combat);[8] the arbitrary formalism of words and phrases in pleading and oaths,[9] — these give the tone to the times. In the light of these it is easy to understand that the notion of Responsibility for Harmful Results was determined largely by crude primitive instincts of superstition, — that our ancestors were satisfied with finding a visible source for the harm and following out their ideas of justice upon it.

It must be remembered, moreover, that we are here dealing with a sentiment characteristic of primitive justice everywhere. It was, beyond question, universal. It appears not only in the strictly Germanic peoples, but in the records of all the race-stocks, however mixed, of post-Christian Eu-

[1] The keenest and most comprehensive analysis of these related features of primitive life is to be found in The Origin and Development of Moral Ideas, by Edward Westermarck (lecturer at Helsingfors and at London; Eng. ed. 1906), vol. I (vol. II, 1908, has little). Next in suggestiveness and insight should be mentioned G. Glotz' La solidarité de la famille dans le droit criminel en Grèce (Paris, 1904). A general survey of the primitive attitude in English law is given in Professor J. B. Ames' article on "Law and Morals," 1908 (Harvard Law Review, XXII, 97).

[2] Westermarck, *supra*.

[3] Westermarck, Glotz, *supra*.

[4] Spencer, Ceremonial Institutions, 10.

[5] Westermarck, Tylor.

[6] Tylor, Primitive Culture (3d Amer. ed.), ii. 380.

[7] Tylor, Ib., ii. 429.

[8] Lea, Superstition and Force, *passim*.

[9] Brunner, Deutsche Rechtsgeschichte, i. 181, ii. 349; Wort und Form in altfranzös. Prozess, 1868 (reprinted in Revue Critique de Législ. et de Jurisp., 1871-72, and more recently in his Forschungen, 1894).

rope, — the Scandinavian,[1] the Flemish-Dutch,[2] the Celtic,[3] the French,[4] the Spanish,[5] the Italian,[6] the Slavic,[7] the Hungarian.[8] It is found in earliest Greece[9] and earliest Rome.[10]

[1] K. v. Amira, Nordgermanisches Obligationenrecht, 1882, I, 389-91; H. Matzen, Forlaesninger over den danske Retshistorie, 1897, II, 48-57; F. Brandt, Forlaesninger over den norske Retshistorie, 1883, II, § 50, pp. 38-46.

[2] S. J. Fockema-Andreae, Het oud Nederlandsch burgerlijk Recht, 1906, II, 115-123; L. A. Warnkoenig, Flandrische Staats- und Rechtsgeschichte, 1842, III, 164, 183, 200; A. His, Das Strafrecht der Friesen, 1901, § 46, pp. 37-61.

[3] Ancient Laws of Ireland, 1879, IV, 247; H. d'Arbois de Jubainville, Etudes sur le droit celtique, 1895, I, §§ 20, 22, pp. 184, 190.

[4] E. Glasson, Histoire du droit et des institutions de la France, 1889, III, 560.

[5] B. Oliver, Historia del derecho de Cataluña etc., 1879, III, 339.

[6] A. Pertile, Storia del diritto italiano, 1892, 2° ed., V, § 170, pp. 58-64; C. Calisse, Storia del diritto penale italiano, 1895, §§ 3-7, pp. 4-13; G. Salvioli, Trattato di storia del diritto italiano, 1908, 6° ed., § 540, p. 720.

[7] W. A. Maceiowski, Slavische Rechtsgeschichte (Germ. tr.), 1839, IV, 278, 281, 301, 305; H. Jirecek, Das Recht in Boehmen und Maehren geschichtlich dargestellt, 1865, vol. I, pt. 2, p. 142.

[8] A. v. Timon, Ungarische Verfassungs- und Rechtsgeschichte, 1904 (Germ. tr. Schiller), 421.

[9] G. Glotz, La solidarité de la famille dans le droit criminel en Grèce, 1904, pp. 48, 165. It is true that B. W. Leist, in his Graeco-Italische Rechtsgeschichte, 1884, pp. 286, 333, 344, 350, 394-406, denies that even in the most primitive Greek period a distinction was made between intentional and non-intentional harms; but in this he stands alone; though Freudenthal, in Mommsen's Zum aeltesten Strafrecht (cited *infra*, n. 4) inclines to that view. However, Glotz has once for all demonstrated the matter. It is doubtless to be conceded that the Greeks developed the distinction at an earlier stage of their history than any other people; this was simply one of the many marks of their precocious sense of ethics in justice. The later Greek ideas are fully discussed in R. Loening's Die Geschichte der strafrechtliche Zurechnungslehre, 1905, vol. I: Aristoteles; on which an elaborate critique is made by O. Kraus, in Der Gerichtsaal, 1904, LXV, 153, 172, "Die Zurechnungslehre des Aristoteles."

[10] T. Mommsen, Zum aeltesten Strafrecht der Kulturvoelker, Fragen zur rechtsvergleichung, 1905, p. 3 (with contributions also on the Greek, Hindu, Arab, Islamic, and Germanic laws, by various scholars, and another on Roman law, by Hitzig, agreeing with Mommsen); Pernice, Labeo, 1873-1900, I, pp. 117, 216, II, pp. 5, 36, 49; Beschuetz, Die Fahrlaessigkeit, *infra*, note 7; R. v. Ihering, Das Schuldmoment im Roemischen Recht (in his Vermischte Schriften, 1879), pp. 155, 163, 200 ("Is the eye of primitive man closed to the discrimination of culpable and innocent intent? . . . [It is, for] a wrong is estimated, not according to its cause, but its effect, — not according to some element in the person of the doer, but from the standpoint of the injured party"); Hepp, Die Zurechnung auf dem Gebiete des Civilrechts, 1838, *passim;* Mommsen, Römisches Strafrecht, 1899, p. 85 ("the idea of wrong requires an unlawful intent in a person having capacity; but this fundamental principle of developed criminal law is in the origins of that subject an alien one.")

It is equally marked in the Semitic races — Jews [1] and Mohammedans —,[2] as well as their predecessors in Chaldea and Egypt;[3] and in the totally unrelated Hindus [4] and Chinese,[5] as well as the Japanese.[6] And in the primitive tribes still surviving everywhere — in Africa, Australia, America, and Asia — it is still observable.[7] In the two following passages, its general bearing is broadly stated:

1884, *A. H. Post,* Die Grundlage des Rechts und die Grundguege seiner Entwickelungsgeschichte, §§ 39, 40, pp. 350, 354:

"All wrongs are originally violations of rights between one clan and another. Every wrong done by an individual creates an obligation for his clan towards that of the injured person. There is thus no doctrine, in civil wrongs, about intent, negligence, guilt, capacity, voluntariness, mistake, fear, or the like. The whole point of view of individual mental states which dominates our modern tort-law (a law essentially of individual rights

[1] I. J. M. Rabbinowicz, Législation criminelle du Talmud, 1876, p. 174; J. Thonissen, Etudes sur l'histoire du droit criminel des peuples anciens, 1869, II, 183, 265, App. D; Numbers, XXXV, 22-25, *et passim.*

[2] Thonissen, *supra,* II, 271; J. Kohler, Zur Lehre von der Blutrache, 1885, p. 23; J. Goldziher, in Mommsen's Zum aeltesten Strafrecht, *supra,* 104; Wellhausen, ibid. 96.

[3] Thonissen, *supra,* I, 163, 164; Code of Hammurabi, ed. Harper, §§ 196-208, 249-251.

[4] Oldenberg, in Mommsen's Zum aeltesten Strafrecht, *supra,* 76; J. Kohler, Das Indische Strafrecht (Zeitschrift fuer vergleichende Rechtswissenschaft, 1903, XVI, pp. 179, 183, note 13); E. P. Buffet, translation of Parajika, III, c. 5 (American Law Review, XLII, 387, 423; 1908).

[5] H. Betz, Chinesische Strafrechtsfaelle [der Gegenwart] (Zeitschrift fuer vergleichende Rechtswissenschaft, XXI, 393, 397; 1908). Staunton, tr. of Ta Tsing Leu Lee (Penal Code), 1810, § 292, and App. XI; C. Alabaster, Notes and Commentaries on Chinese Criminal Law, 1899, pp. 260-287; A. Leclère, Recherches sur la législation criminelle des Cambodgiens, 1894, pp. 292, 299, 371.

[6] O. Rudorff, Tokugawa Gesetzsammlung (Mittheil. der deutschen Ostasiatischen Gesellschaft, 1889), Art. 71, §§ 36-39, Art. 74 of the Kujikata Osadamegaki of 1742-83; H. Weipert, Das Shinto-Gebet der grossen Reinigung (Der Gerichtsaal, 1904, LXV, 241, 261).

[7] Westermarck, Moral Ideas, *supra,* passim; A. H. Post, Afrikanische Jurisprudenz, 1887, II, § 199, p. 28; A. H. Post, Grundriss der Ethnologischen Jurisprudenz, 1894-5, II, §§ 48-55, pp. 214-233; P. Wilutzky, Vorgeschichte des Rechts, 1903, II, 40; Beschuetz, Die Fahrlaessigkeit innerhalb der geschichtlichen Entwickelung der Schuldlehre, Teil I: Vom primitiven Strafrecht bis zur peinlichen Gerichtsordnung Karls V (No. 76, Ser. XIV, in v. Lilienthal's Strafrechtliche Abhandlungen, Breslau), 1907, § 2, pp. 8-28. Loening's notable book (*supra,* n. 3) is apparently not completed beyond Greek law.

Even Blackstone had registered his observance of this primitive trait (Commentaries, IV, 187), with Greek, Roman, and Jewish citations.

and duties) is alien to primitive law. Each clan is liable to the other for every injury suffered, whether it be done by adult clan-members or by women, children, animals, or lifeless objects belonging to the clan, and whether the wrongdoer be blamable or be merely the involuntary tool of external forces. It is only with the dissolution of the clan-organization that the individual aspect of wrongs comes into consideration; and at the same time the wrongdoer's mental state (wholly ignored in clan-law) comes for the first time into the foreground. . . . With the disappearance of the clan-organization and the development of the State, by which the inter-tribal union grows into a community held together by a higher social power, and in which the individual is accorded a more or less personal sphere of rights, there arises gradually the notion of personal culpability as a presupposition of personal responsibility for wrongs. One of its first expressions is in the idea that harm caused by accident is not to be so stringently treated as an intentional harm. Though the intentional harm would justify a blood-feud, the accidental one can be compounded by expiation-money; and wherever the injured party's duty to accept expiation-money comes to be recognized, this is found first applied to accidental harms.

"A further mark of this gradual transition to personal culpability appears in the diminution of the fine for negligent harms as compared with that for intentional ones; and also in the application of the negligence-fine to harms done by the women, children, slaves, animals, and lifeless objects belonging to the clan, or by a blood-relation not himself responsible. . . . To this distinction between intentional and unintentional harms the distinction appears to be originally due between criminal and civil law. The intentional wrong becomes the crime, by which the doer is made corporally responsible. The unintentional wrong creates only an obligation to give redress; only the property of the wrongdoer is thereby made liable. It is only gradually that certain negligent misdeeds are made punishable as crimes, and that certain intentional wrongs are treated merely as calling for redress. . . .

"Moreover, a special grouping of negligent wrongs is quite alien to the early legal systems. Only intentional and unintentional acts are distinguished. The unintentional includes the negligent as well as the unavoidable, but without discriminating them. . . . With the rise of the conception of culpability as the presupposition of a wrong, there develops a deep and remarkable change in legal ideas. In the primitive the social order is regarded merely from a mechanical point of view and the responsibility for harm is placed on him who caused it, regardless of whether he willed it or was only the medium of a higher force;

but now the mental side of the social union comes strongly to the front. There is thus prepared the basis for a psychological theory of compromise or settlement. The principle that without moral culpability no liability arises either to make compensation or to suffer punishment develops necessarily a body of doctrine about guilt, capacity, intent, negligence, and thus to distinctions between voluntary and involuntary acts. The mechanical aspect of the social order, originally the marked one, now begins more and more to be ignored, and the mental aspect, on the other hand, comes to be exclusively emphasized."

1888, *P. F. Girard,* Les actions noxales, in Nouvelle revue historique du droit français et étranger, XII, 38:

" There is a phenomenon which one can discern throughout all antiquity, — that is, vengeance, the physical, unreasoning emotion, which drives the victim of an injury to a violent reaction against the immediate author of the injury. He who regards himself as offended against, takes vengeance for the offence as he will and as he can, alone or with the help of others, recognizing only the brute fact that he has suffered, and dominated by a feeling of resentment measured solely by the harm he has undergone. . . . The victim of the harm knows nothing but the harm done to him. He does not concern himself with the intent of the doer. . . . He therefore revenges himself for the harm-causing act, even though it may have been unintentional. . . . Moreover, for the same reason, the victim takes his revenge even where the immediate author of the harm is not capable of intending it, — where it is not a human being, but an animal, or an inanimate object." [1]

In this particular field, too, there are numerous manifestations, all akin. The doer of a deed was responsible whether he acted innocently or inadvertently, because he was the doer; [2] the owner of an instrument which caused harm was responsible, because he was the owner, though the instrument had been wielded by a thief; [3] the owner of an animal, the master of a slave, was responsible because he was associated with it as owner, as master; [4] the master

[1] So far as regards the many concurring elements that produce this particular principle, it should be noted that Post over-emphasizes the clan-life element, while Girard over-simplifies the problem in noting only the vengeance-instinct. How tangled the primitive elements are can be seen in Westermarck's masterly chapter, (cited *supra,* p. 476, note 1), pp. 30-72, 217-231, 241-260, 306.

[2] See *post.*

[3] See *post.*

[4] See *post.*

was liable to his servant's relatives for the death, even accidental, of the servant, where his business had been the occasion of the evil;[1] the *rachimburgius*, or popular judge, was responsible for a wrong judgment, without regard to his knowledge or his good faith;[2] the oath-helper who swore in support of the party's oath was responsible, without regard to his belief or his good faith;[3] one who merely attempted an evil was not liable because there was no evil result to attribute to him;[4] a mere counsellor or instigator of a wrong was not liable, because the evil was sufficiently

[1] Brunner, Deutsche Rechtsgeschichte (1892), II, 549. "The master was liable for the *wergeld* of the workman if the latter lost his life in the service, and for the appropriate money-payment if he was injured, — so far as the injury could not be imputed to some third person for whom the master (who had to answer for the misdeeds of his own people) was not responsible. If one who was in the service of another lost his life by misadventure, by reason of a tree or of fire or of water, the accident was imputed to the master as *homicidium*. If one person sent another away or summoned him on the former's business, and the latter lost his life while executing the order, the former was taken as the *causa mortis*." See LL. Henry I. 90.

[2] Brunner, Ib., II, 360. "That the intention to act wrongfully is presumed as of course against the defeated party [in a suit against the judges], and, especially as regards the judges, that the excuse of having judged according to their best knowledge and belief is not allowed, is merely an individual application of a fundamental principle pervading the Germanic penal law, which is to argue without question from the particular external circumstance to the presence of an unlawful intent, and (apart from typical exceptions, not here involved) to treat unintentional misdeeds the same as intentional ones, without allowing proof of the absence of intent."

[3] Brunner, Ib., II, 389. "The earlier times paid no regard to the good faith of the individual oath-helper, in accordance with their general principle of penal law, which without discussion treated the unlawful intent as accompanying the external fact of an offence. . . . The latter development shows the tendency, on the one hand, to increase the punishment for a false oath, but, on the other hand, to distinguish between false oaths sworn wittingly and unwittingly." It may be suggested that when the learned investigator in these passages speaks, *e. g.*, of "treating the unlawful intent as accompanying, etc.," he hardly means to attribute to a past age the sentiments peculiar to the present one. The primitive Germans did not "presume" or "impute" an unlawful intent: they simply did not think of the distinction at all. To feel the need of such an element, and to "impute" or "presume" it, marks a later stage of development.

[4] Brunner, Ib., II, 558. "The penalty of unintentional misdeeds is parallelled by the general impunity accorded to attempts." Moreover, though certain acts which fell short of causing death, and yet put life in peril (as pushing into the water, etc.) were treated as lesser offences, somewhat as we treat attempts; yet "it was immaterial whether the result was caused with the intention of killing, or with some other design, or unintentionally" (560).

avenged by taking the prime actor,[1] and where several co-operated equally, a lot (frequently) was cast to select which one should be amenable;[2] while the one who harbored or assisted the wrongdoer, even unwittingly, was guilty, because he had associated himself with one tainted by the evil result.[3] Of these various forms of the primitive notion which determined responsibility, we are here concerned with only a few, — those that have a more or less intimate connection with later doctrines of the English law of torts, and are therefore for us more worth tracing from early times.

These may be, for convenience, grouped into four classes, each one of which will be to better advantage followed out separately, — to be distinguished according as the harmful results may be traced back to (*a*) a personal deed; (*b*) an animal; (*c*) an inanimate thing; (*d*) a servant or slave. It will be convenient also to take up first the general Germanic notion, and follow it down to, say, the Norman Conquest, and then to keep to English soil, and trace down the later forms. As it happens, this division falls in fairly with epochs of doctrinal change.[4]

[1] Brunner, Ib., II, 565.

[2] LL. H. I. 59, 25; Brunner, Ib., II, 468.

[3] Brunner, Ib., II, 575. "From the jural notion that the misdeed in itself puts a man beyond the law, follows fundamentally the penalty on the act of rendering assistance. . . . [This notion] has to do with the idea that the helping of the offender is a mutiny against the common weal, or it springs directly from the principle that he who stands out for the wrongdoer takes upon himself, as against the community, the wrongdoing and its consequences."

[4] Note. — This seems the best place to say, once for all, that the ensuing first part of the essay is for the most part merely a condensation of Prof. Dr. Heinrich Brunner's article in the Proceedings of the Royal Prussian Academy of Sciences, vol. xxxv., July 10, 1890, "Ueber absichtslose Missethat im altdeutschen Strafrecht," afterwards reprinted in the learned author's Forschungen zur Geschichte des deutschen und franzoezischen Rechts (1894).

As to the sources there quoted, this part is in effect merely a reproduction of the salient ones, the citations of the learned author are left unchanged, except that dates and authors' initials have been added for identifying the modern source-books cited. As to the conclusions reached, they have here been presented in a somewhat different form and arrangement, with a view to tracing subsequent English development; but it would seem that Professor Brunner would prefer this, for in his 1892 volume of the Deutsche Rechtsgeschichte he has chosen an arrangement more nearly resembling the present one. His article will here be cited as "Br., Pr. Ak.;" his treatise, as "Br., D. Rg." A few gleanings from recent volumes of the Selden Society, from Bracton, etc.,

I

We have, then, to deal with the primitive notion which instinctively visits liability on the visible offending source, whatever it be, of a visible evil result. The notion, as applied to persons, is that of the *schædliche Mann*, a person from whom some evil result has proceeded.[1] It can best be illustrated in advance by two instances, one drawn from a well-known tale in the Northern mythology, the other from mediæval Frisian chronicles: —

"Baldur the beautiful was beloved by all the gods, and Frigga had exacted an oath from all things — fire, water, stones, trees, and all — not to harm Baldur; for Baldur had dreamed of his own death. Then the gods, his safety assured, began in fun to pelt him with stones, clubs, and battle-axes, and found him indeed invulnerable. But Loki the jealous was vexed because Baldur was not hurt; and going in disguise to Frigga, he learned that the mistletoe alone had not been sworn, for it seemed too feeble a plant to do harm. Then Loki went up to Hodur, the blind god, who had been standing apart, for he had nothing to throw. He could not see to aim, so Loki gave him the mistletoe twig and guided his hand, and the twig flew, and struck Baldur lifeless. Then the other gods were for laying strong hands on the murderer; but they were in a sacred place. And Hodur fled. And Odin said, 'Now, who will wreak vengeance on Hodur, and send Baldur's slayer to Hades?' The avenger was Wali, Baldur's younger brother, who washed not his hands and combed not his hair until he had fulfilled his vengeance and smitten to death the slayer of Baldur."[2]

A clearer case of innocence, one would think, in these days, could hardly be made out; but not so by the tests of our ancestors. — Next, an example showing an exceptionally late survival of these ideas, and at the same time the transition to different standards: —

have been added by the present writer, so as to bring the topics in this part of the article down to about the 1200s in England.

[1] Br., D. Rg. II, 537; 2d ed. 1906, I, § 21, p. 211.

[2] In Bugge, Norrven Fornkvaedi (Christiania, 1867), p. 212, is another instance, from the Song of Sigurd, the slayer of the dragon Fafnir. Loki, in company with Odin and Honir, had seen an otter and killed it with a stone; for it had been carrying off the pelts belonging to the gods. But they discovered that the supposed otter was none other than the son of Hreidmar, who had put on the form of an otter; and, for the compensation they were obliged to give, they filled the otter-skin within and covered it without with gold, and gave it to Hreidmar.

"Owen Alwerk was brewing beer. During his absence the child of Swein Pons came in and stood by the kettle. The kettle slipped from its hook, and the liquid burned the child so that it died on the third day. The relatives of the child pursued Alwerk, who fled to the house of a friend for refuge. The master of the house opposed the entrance of the pursuers, and an affray ensued, in which the master by inadvertence killed his own nephew. The affair was laid before six men as judges; and they decided at first that Alwerk must pay the head-money for the dead child and for the dead nephew, and must besides make a pilgrimage to Rome. But Alwerk opposed the judgment, and to such a good purpose that they altered it to this effect, — that he should be absolved without more from the child's death, and from the nephew's if he swore that he did not urge on the master of the house to fight." [1]

With these preliminary illustrations of the attitude of mind we are dealing with, we may take up, in the order of topics already named, the primitive ideas for the exposition of which we are indebted to the great Brunner.

a. Harm connected with a Personal Deed

It is not possible to draw hard-and-fast lines in tracing the stages of development; we can simply note that there were several stages, and point to particular rules or passages as illustrating approximately this or that successive form.

1. Of the primitive form of absolute liability, then, we find a few comparatively late traces; though, as Brunner points out, the fact of the necessity for an express mention of a prohibition or a penalty in a law is often an indication that the popular regard for the principle involved is on the wane:

Lex Bavariorum, 19, 6. — "Who injures the corpse of a man whom another has killed, either by cutting off the head or the ear or the foot, or by otherwise drawing the slightest blood, pays a fine of twelve shillings." The example then given is this: The corpse of a murdered man is discovered by birds of prey, who settle upon it to devour it; a man sights them and draws bow at them, but strikes the corpse so that it is wounded: he shall pay the fine.

[1] A. D. 1439, Richthofen, K. v., Friesische Rechtsquellen, 570; 1840.

Westgothic Law.[1] — The rule of Wamba: "Ut quicumque deinceps occiderit hominem, si volens aut nolens homicidium perpetravit, . . . in potestate parentum vel propinquorum defuncti tradatur."

Roger of Sicily's Law (1100-1150).[2] — "Qui . . . lapidem ad aliud jecit hominemque occidit, capitali sententia feriatur." The notable thing is that the first part of the law is a copy of the *Lex Cornelia de sicariis;* but liability is substituted for non-liability, and the above is added.

Anglo-Saxon Law. — (1) Beowulf (Chronicles) v. 2436 (ed. Heyne): the story of King Hredel, whose second son, Haedcyn, unfortunately killed his brother by an arrow which went wide of the mark. The death of the slayer was required in expiation; and the king so mourned at the untimely loss of his two sons that he took his own life. (2) LL. Henry I. (so called) 90, 11: "Legis enim est, qui inscienter peccat scienter emendet, et qui brecht ungewealdes [unintentionally] bete gewealdes, . . . [*e. g.*] si alicujus equus, ab aliquo stimulatus vel subcaudatus, quamlibet percuciat."

It may be noted here that the proceeding of attaint was only a later form of the same early notion. In early times it was a general custom, where adultery or the like was discovered, to slay every living thing within the house, whether man or beast.[3] The legal visitation of the sins of the fathers upon the children was one of the latest survivals of this idea.[4]

[1] Walter, Corpus Juris Germanici Antiqui, I, 668. The general dates of these Germanic codes vary from 400 to 900 A. D. *circa.* The large collections usually referred to for the texts are Monumenta Germaniae Historiae, Quarto ed., 1888+ (cited M H G), and Schmid's Gesetze der Angelsachsen, 2d ed. 1858, now superseded by Liebermann's Die Gesetze der Angelsachsen, 1898-1906; other editions and source-books will be found cited in Br. D. Rg. I, vii.

[2] Merkel, Commentatio, 1856, p. 31, fragm. 42.

[3] J. Grimm, in Zeitschrift fuer deutsches Recht, V, 17, 18.

[4] Westermarck, Origin of Moral Ideas, c. XX. Bracton says (f. 105*b*): "Crimen vel pœna paterna nullam maculam filio infligere potest;" but this is a borrowed humanity, and does not represent the actual law of his time. By the Golden Bull of Charles IV. in 1356, the lives of the sons of such as conspire to kill an elector of the Imperial Crown are spared by the Emperor's particular bounty; but they lose all rights of succession and of holding office, "to the end that, being always poor and necessitous, they may forever be accompanied by the infamy of their father, may languish in continual indigence, and may find their punishment in living and their relief in dying." In Blackstone's time this corruption of blood still existed, though he disparages it; but the forfeiture of estates he defends on grounds of policy.

2. As times change, and superstition begins to fade, the notion of "misadventure," "ungefaehr," is hazily evolved, and facts of the sort are regarded as ground for an appeal to the king or the lord on the offender's behalf. The strict law is thus regarded as requiring his punishment; but no vengeance can be wreaked upon him, no blood-feud started by the members of the victim's family:

Holland. — In 1425 Aelwyn, a citizen of Delft, had "by ongevalle ende onwetende"[1] killed another. The case went to the lord, Philip of Burgundy, who granted a pardon: "We hold the said Aelwyn quit and forgiven by this letter of all wrong and misdoing which he has done against us and our lordship, and we give him again his life and goods, which he thereby should have forfeited to us."[2]

France. — (1) *Coutumes de Clermont en Beauvoisis* (1200+):[3]

"In case of accidents happening by mischance, in such cases *pités et miséricorde* ought rather obtain instead of stern justice." When a man in turning his wagon injures another, "it is a case of mischance, and the wagoner should be shown mercy, if it does not appear that he managed it with a malicious purpose of injuring the other." If one is separating two quarrellers, and accidentally injures the one who is his friend, "let mercy be shown him." (2) *Somme Rurale:*[4] Under the head "d'occire autre par cas d'aventure," all such cases are said to fall under the penalty of death, and to need remission by the prince.

England. — (1) *Anglo-Saxon* laws, quoted *post.* (2) *Bracton,* De Legibus: "Crimen homicidii, sive sit casuale vel voluntarium, licet eandem pœnam non contineant, quia in uno casu rigor, in alio misericordia" (f. 104 *b*; also 141 *b*). (3) *Stat. Gloucester* (6 Ed. I., 1278) c. 9: If one kills another in defending himself or by misadventure, he shall be held liable, but the judge shall inform the king, "et le roy lui en fra sa grace, s'il lui plaist." (4) *Fleta*[5] repeats the rule of the statute. (5) *Early cases* in the King's Court: (1214) "Roger of Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king, moved by pity, pardoned

[1] "By accident and unwittingly."
[2] Van Mieris, Groot Charterbuch van Holland, 4, 800.
[3] Beaumanoir (ed. Beugnot, 1847, Salmon, 1899), c. 69.
[4] Bouteiller (pub. 1537), ii. 40.
[5] I, 23, 15.

him the death. So let him be set free." [1] (1225) "Mabel, Derwin's daughter, was playing with a stone at Yeovil, and the stone fell on the head of Walter Critels, but he had no harm from the blow; and a month after this he died of an infirmity, and she fled to church for fear, but [the jurors] say positively that he did not die of the blow. Therefore let her be in custody until the king be consulted." [2]

It is to be noted that a killing done in *self-defence* was regarded as one of those which required to be pardoned in this way by the king; and this notion long left its impress on English criminal law: [3]

Early Cases. — (1221) "Howel, the Markman, a wandering robber, and his fellows assaulted a carter and would have robbed him; but the carter slew Howel, and defended himself against the others and escaped them. And whereas it is testified that Howel was a robber, let the carter be quit thereof. And note that he is in the parts of Jerusalem, but let him come back in security, quit as to that death." [4] Note that there is here no resort to the king's pardon, yet the carter had thought it wise to seek safety by absconding. — (1203) "Robert of Herthale, arrested for having in self-defence slain Roger, Swein's son, who had slain five men in a fit of madness, is committed to the sheriff that he may be in custody as before, for the king must be consulted about this matter." [5]

[1] Selden Society, vol. I. Pleas of the Crown, I, No. 114.

[2] Ib., No. 188. See also Bracton, Note-Book, III, 157, No. 1137 (A. D. 1235-36), where "nescitur adhuc utrum ipsum interfecit per infortunium vel alio modo," and so the defendant is allowed to abjure the kingdom.

Bracton, in De Legibus, as above, shows the rule. But other passages there occur which are quite inconsistent with this, and would even do well enough as a rough statement of to-day's law. Of homicide by chance, he says, "as where a person has thrown a stone at a bird or an animal, and another person, passing unexpectedly by, is struck and dies, . . . here it is to be distinguished whether the person was engaged in a lawful or in an unlawful affair. . . . If he was engaged in a lawful affair, . . . if he used such care as he could, . . . it is not laid to his account" (120*b*). Again, he uses the old Roman example of throwing a ball at play and hitting a razor in the hands of a barber while shaving (136*b*). The explanation is simple: he is here copying and adapting from the Roman and civil law, — in the latter case from Dig. 48, 8, 14 (as Brunner points out); in the former from Gregory's Decretal (V, tit. xii.; 1234 A. D.) "de homicidio voluntario vel casuali" (as Twiss points out, Preface, II. lix.).

[3] Blackstone, Comm. iv. 182-188.

[4] Selden Society, vol. I, Pleas of the Crown, I, No. 145.

[5] Selden Society, ibid, No. 70. So also Bracton, De Legibus, 1446, mentioning a case of a pardon to a man who defended himself against a burglar in his own house (A. D. 1234); Bracton, Note-Book, III, 229,

3. But still, in the earlier days, the malfeasor by misadventure must at least pay a fine, though released from the penalty of death, and, later on, when the blood-feud had disappeared and a fixed payment was the regular form of civil liability, he must pay a portion of the ordinary amount:

Holland. — In 1438 Philip of Burgundy pardons by special grace the members of a guild in Leyden who have killed some one by misadventure, remitting the forfeiture of life and goods, but saving the expiation-money due the dead man's kindred.[1]

Franks. — Capitulary of Charlemagne, 819 A. D., with instructions to the *missi*, or itinerant officials: As for a person held to answer, "let this be the treatment, that if one has offended ignorantly, let him not be obliged to pay according to the full rule, but as near as seems possible."[2]

England. — LL. Henry I. (so-called), 90, 11: After the maxim above cited, "qui inscienter peccat scienter emendet," and the illustrations of misadventure, "In these and like cases, where a man intends one thing, and another eventuates, *i. e.*, when the result, not the intention, is charged as blamable, let the judge fix a small fine and fee, inasmuch as it really occurred by accident."[3]

No. 1216 (A. D. 1236-37), where the jury found a killing in self-defence, and "dominus rex de gracia sua, non per judicium, perdonavit ei mortem illam" (1236); also Bracton, N. B. III, 107, No. 1084 (A. D. 1225). These were before the Statute of Gloucester (1278), cited above. So also the following case: Gross, Select Cases from the Coroner's Rolls A. D. 1265-1413, p. 102 (Selden Society, vol. IX; 1895).

[1] Mieris, Handvoeren, etc. der Stad Leyden, 289.

[2] Boretius, Capitularia, I, 290 (M H G, Sectio II), Cap. Missorum, ch. 15.

[3] In old Swedish law accidental killing is not to be punished unless both parties (*i. e.*, the deceased's relatives, practically) wish it (v. Amira, Altschwedisches Obligationenrecht, 382, 1882). So in old Japan the custom is recorded (Simmons and Wigmore, Notes on Land Tenure, etc., Transactions of the Asiatic Society of Japan, 1891, vol. XIX, p. 121) that the judge may pardon if the deceased's family withdraw their charge against a murderer; an application of the rule mentioned in Rudorff's Tokugawa Gesetzsammlung, (cited *supra*, p. 478), Art. 35 of the Reigaki, giving a case of 1744, and Art. 46 of the Hundred Laws of Iyeyasu, a century earlier; note there the idea of expiation, in that the guilty man then becomes a priest: S. & W. *supra*. This is probably the transition-form preceding the above stage; first, the family agree to compound for less money, and then the judge compels them to. A curious example of this phase is seen in the LL. Henry I.: where a man falls from a tree and kills another below, he shall be held innocent; yet the blood-feud will be allowed if insisted upon, but it may be carried out in one way only, — the avenger may himself mount the tree, and in turn fall upon the slayer. This is recorded also in Holland (Brieler Rechtsbuch, Matthijssen, 212; pub. in Oude Vaderlandsche Rechtsbron-

4. Moreover, probably at a somewhat later stage, as the notion of complete exculpation (in a criminal process) grows, the malfeasor must, immediately after the occurrence, give notice of it, and swear an extra-processual exculpatory oath as to its occurring by accident or in self-defence; otherwise, he loses the benefit of the plea if suit is brought:

Franks. — Lex Ripuaria, 77: When a man slays a malefactor, *flagrante delicto,* who has resisted capture, he must make oath with eleven helpers that he slew the other as an outlaw; if he does not, "homicidii culpabilis judicetur." Then afterwards he must come to his trial within forty nights, and make oath with thirty-six law-men.

Sweden. — The wrongdoer by misadventure, without waiting for suit, must offer an oath and render satisfaction for the deed.[1]

Holland. — The oath of exculpation for the death of a servant declared that it happened "by his self's fault and by misadventure, and without deed of his."[2]

In the thirteenth century, then, in England we find the primitive notion still living, for harm caused unintentionally; in cases of homicide, at least, the slayer forfeited goods and paid some fine or fee to the king in a criminal process, and in probably all torts the harmdoer paid some compensation to the injured party.[3]

We leave this topic at that stage, and turn to —

b. Harm connected with Animals

The successive phases of development are nearly akin to those already considered.[4]

[1] v. Amira, Altschwedisches Obligationenrecht, 379.

[2] Brieler Rechtsbuch, Matthijssen, 210. So also, in maritime law, for a death on shipboard: Fruin, De oudste Rechten der Stad Dordrecht (1882), ii. 52, No. 70; i. 235, No. 79 (Oude Vaderlandsche Rechtsbronnen, 1882, 1st ser. vol. IV); and R. Wagner, Handbuch des Seerechts, 1884, I, 399.

[3] For some cases of "misadventure" not particularly significant, see Selden Society, Pleas of the Crown, I, Nos. 81, 132, 156, 203 and Seld. Soc. vol. IX, Gross' Select Cases from the Coroner's Rolls, pp. 24, 38. The general principle is noted in Bateson's Borough Customs, 1906, II, Introd. p. 40 (Selden Society, vol. XXI).

[4] For the corresponding phases in the noxal action of Roman law, see the following special articles besides the usual treatises: P. F. Girard,

nen, 1880, 1st ser. vol. I), and in a Hindu popular tale (Kohler, Shakespeare in dem Forum der Jurisprudenz, 93; 1883).

1. Of the primitive idea of full liability for harm caused by one's animals, there are a few traces:

Sachsenspiegel [1] speaks of complete liability being the ancient rule, "quantum si facinus in persona propria commisisset."

2. In the next phase, the injured party is found without the privilege of carrying out the blood-feud; this recognition of the unintentional nature of the deed seems to have come earlier here than in any other class of cases. But the owner is still answerable for the *wergeld* or the *composito* appropriate to the harm done, — by most laws for the full sum, by others for an aliquot part; and in many cases the value of the mischievous animal, if surrendered, can be used in reduction of this sum:

The full sums were required by the early Lombards,[2] the Anglo-Werini,[3] and the Saxons; [4] the Alamanni [5] required it for injuries by horses, oxen, swine, but one half only if by others; the Frisians [6] required one quarter only. The Salians (early period) [7] and the Ripuarians [8] required the whole, but allowed the animal to go for one half. The later Lombards required one half. [9] These rules may be traced in much later records of those regions. [10]

3. The next step is to absolve the owner entirely, if he divests himself of all relation with the accursed thing by putting it from him entirely; and this would take place, (1) in the beginning, by handing it over to the injured

quoted *ante*, p. 480; H. Isay, Die Verantwortlichkeit des Eigenthuemers fuer seine Thiere, in Ihering's Jahrbuch, 1898, XXXIX, 209-322 (an exhaustive study).

[1] Landrecht, ii. 62, Sunesen, 55.
[2] Rothar, 326-8, 330.
[3] Lex Ang.-W., 52.
[4] Lex Sax., 57.
[5] Pactus Alam., iii. 17.
[6] Lex Fris. Add., 3, 68.
[7] Lex Salica, 36.
[8] Lex Rip. 46.
[9] See note 1.
[10] Etablissemens de St. Louis, i. 125; Warnkönig, Flandrische Rechtsgesch., ii. 2. 226 (1265). In Pact. Alam., where a dog bit to death, the half *wergeld* was allowed; yet the avenger might demand the whole, on condition that he should suffer the dog's dead body to hang in his doorway till it rotted away (iii. 16).

party for the infliction of vengeance (or, as above, in time, as in some sort a compensation or perquisite), and (2), later, by merely turning the animal loose:

(1) *Lex Visigothorum.*[1] — The animal is delivered "ut eum occidat."

Laws of Alfred.[2] — (871-901) "If a neat wound a man, let the neat be delivered up or compounded for."

Fitzherbert.[3] — (1333) "If my dog kills your sheep, and I, freshly after the fact, tender you the dog, you are without recovery against me."

(2) *Flanders.*[4] — (1241, 1264) The owner is not liable if he "expellet et abneget" the animal.

Poitou.[5] — The owner is freed if he "désavouer" the animal; and he is bound if he takes it back again.

Norway.[6] — The owner is free if he "von der hand sagen" the horse, swine, ox, or dog; otherwise he is liable as if the murderer.

The owner would thus not be liable if the animal had escaped; for he is no longer connected with it, he is absolved:

Twisden, J.:[7] "If one hath kept a tame fox, which gets loose and grows wild, he that hath kept him before shall not answer for the damage the fox doth after he hath lost him, and he hath resumed his wild nature:" this may be a trace of the early notion.[8]

Moreover, the notion that the owner is liable if he harbors or takes the animal back after repudiation,[9] became, when rationalized as time went on, one of the sources (apparently) of the *scienter* rule in English law.

It must be added that the feature of delivering to the opposite party for his purpose of wreaking private vengeance

[1] Lex Visig., 8, 4, c. 20. *Accord,* Schwabenspiegel (Lassberg), 204.
[2] C. 24.
[3] Abridgment, Barre, 290.
[4] Warnkönig, Flandrische Rechtsgeschichte, ii. 2, No. 222; iii. No. 166.
[5] Livre des droiz et des commandemens, c. 871.
[6] Brandt, Forlaesninger over den Norske Retshistorie, ii. 46.
[7] Mitchel *v.* Alestree, 1 Vent. 295 (1676).
[8] For further traces in later times, see Holmes in The Common Law, 22 and *ante*, in Essay No. 63.
[9] Poitou, *supra.*

was largely supplanted by the idea of forfeiture to the authorities for public punishment: sometimes the animal was outlawed, and could be killed by any one;[1] later it was forfeited to the lord or to the church.[2] Sometimes it was tried for its offence, and the theories and methods of trying and punishing animals form a long and interesting sidepath from the present subject.[3]

4. Along with all this we find in various regions in later times the requirement of an exculpatory oath as a preliminary to allowing the owner to free himself by giving up the animal. The oath perhaps at first declares merely that the owner was not privy to the wrong; but later it is that the owner was not aware of the animal's vice:

Lex Salica.[4] — "Per lege [oath] se defendere potest, ut nihil pro ipso pecore solvat."

Livre des Droiz, etc.[5] — "Celui a qui le beste sera est tenu de amender le dommage au blécié; et si ne fera amende a justice, par quoy il ose jurer qu'il ne sceust la teiche de la beste [that he did not know the vice of the animal]."

Flanders (1241). — The owner is not liable unless the animal has for at least two days shown "manifestae noxae."

From this basis (and perhaps that just mentioned) the later doctrines as to animals *ferae et mansuetae naturae*, and as to a *scienter* of the tame animal's viciousness in cases of violent injuries, would easily work out.

[1] Bouteiller, Somme Rurale, i. 38; Magk (Norway), in Paul's Grundriss der germanischen Philologie, ii. 1, 120; Andreae, Stadregt van Vollenhove, i. 316. But the sentiment which ultimately grew up may be early seen in scattered passages: "Car bestes mues n'ont nul entendement, qu'est biens ne quest maus" (Beaumanoir, Coutumes de Beauvoisis, 6, 16).

[2] Etablissemens de St. Louis, i. 125; Coutumes de Touraine-Anjou, 114; Livre des droiz, etc., 119; Bouteiller, Somme Rurale, i. 37.

[3] K. v. Amira, Thierstrafen und Thierprocesse (1892); E. P. Evans, The Criminal Prosecution and Capital Punishment of Animals (1907); Westermarck, Origin etc. (cited *ante*, p. 476), pp. 254-260.

[4] C. 36 (later texts).

[5] C. 114; Etablissemens de St. Louis, i. 125; Bouteiller, Somme Rurale, i. 38 (where the owner had been warned by the local authorities).

[6] *Ubi supra*, par. 3.

c. *Harm connected with Inanimate Things*

Here we may trace, *mutatis mutandis*, stages of development substantially analogous to those found in the preceding class of cases.

1. Of the most primitive form, subjection to the blood-feud for injuries caused by things belonging to a person, and without the owner's personal use of them, there are only a few traces, for the change came early:

In the early times,[1] when rape or adultery was committed in a house, its inmates were killed, and the house (of commission or of refuge) was destroyed.

2. This passes into a mere pecuniary liability, accompanied sometimes by the duty of handing over the injuring thing, sometimes by the privilege of using its surrender to reduce the amount of the payment:

LL. Henry I.[2] — A fine was imposed "si alicuius arma perimant aliquem ibidem posita ab eo cuius erant."

Schleswig.[3] — If one is building a house, and a beam falls and kills a man, the beam is to be given over to the dead man's heirs (or, by later law, merely thrown away), and the owner also pays them 9 marks.

3. The notion of complete exculpation by a surrender or repudiation of the offending thing, or by an abstention from using it again, very early makes its appearance:

Lex Ripuaria.[4] — "Si quis homo a ligno seu a quolibet manufactile interfectus, non solvatur,[5] ni forte quis[6] auctorem interfectionis in usus proprios adsumperit; tunc absque frido culpabilis judicetur."

Schleswig. — In the case above, if the beam is built in after all, the whole house is forfeited.

[1] J. Grimm, in Zeitschrift fuer deutsches Recht, v. 17-18; Westermarck, Origin, etc. (cited *ante*, p. 476), p. 262.

[2] C. 90, 11.

[3] Thorsen, De Stadsretter for Slesvig, etc. (1855), 19, 49, 75, 192.

[4] C. 70, 1. This is found in almost the same words in LL. Henry I., 90, 6.

[5] No payment need be made.

[6] Observe that *any* one who uses them is liable.

Norway.[1] — A traveller speaks of seeing sickles, axes, and the like, with which men have been killed, lying about abandoned and unused.

LL. Henry I.[2] — The owner of weapons used by another to do harm must not take them into his hands again till they are "in omni calumpnia munda."

The notions with regard to the forfeiture of such noxal things passed through phases similar to those respecting animals; and the "deodand" is one of the traces in later law.[3]

4. In some cases the feature reappears (along with the principle of exculpation by surrender or repudiation) of a preliminary exculpatory oath:

LL. Henry I.[4] — Where a man puts down his arms somewhere, and another takes them and does harm with them, or where he has left them with a polisher or a repairer, and the like happens, the owner must free himself by oath.

5. Finally, but coming at different times with respect to different classes of things, we find something approaching a rationalization of the rules. In some clear cases there is an absolute exculpation, without more said; in others, there is a foreshadowing of a test of due care or the like:

Lex Burgundiorum.[5] — It is found necessary to say that if a lance or other weapon is stuck in the earth, and a man or animal chances to trip on it, the owner need not pay.

[1] Liebrecht, Zur Volkskunde (1879), 313.

[2] C. 87, 2.

[3] Holmes, Common Law, 25, citing, among other cases, "If my horse strikes a man, and afterwards I sell my horse, and after that the man dies, the horse shall be forfeited" (Plowden, 260). A number of instances will be found in Gross' Select Cases from the Coroners' Rolls A. D. 1265-1413 (Selden Soc. Pub., vol. IX; 1895), pp. 8, 15, 40, 50, 54, 59, 68, 77, 82, 92, 94, 95, 96, 99, 105, 106, 121, 122, 125; Bateson's Borough Custumals, I, 17 (Selden Soc. Pub. vol. XVIII, 1904). For Roman law, see Girard's article cited on p. 480, *ante*. Every one is familiar with the fossil remains of the deodand in the clause of the criminal indictment stating the value of the weapon with which a murder was done.

[4] C. 87, 2.

[5] C. 18, 2, and see LL. Henry I., 90, *passim*.

Lex Saxonum.[1] — Payment must be made, where injuries occur from ditches or traps, "a quo parata sunt."

Lex Anglo-Werinorum.[2] — "Qui machinamentum fecit, dampnum emendet."

LL. Alfred.[3] — Where a man is injured by a spear in another's hand, he is liable "if the point be three fingers higher than the hindmost part of the shaft; if they both be on a level, . . . be that without danger."

Sweden.[4] — At first the owner, but afterwards the user, of the noxal instrument must respond.

France.[5] — When a man is killed during the erection of a house, neither the structure nor the master shall bear any liability, if a warning notice had been given.[6]

d. Harm connected with a Servant

1. There was certainly a time when the master bore full responsibility for the harmful acts of his serf or his domestic. It is worth while to emphasize this by quoting passages from Professor Brunner's chapter on "territorial lordship,"[7] his name for "the sum of the rights exercised by the lord over the tenants:"

> "As regards the origin of territorial lordship, we have to distinguish in the Frankish empire a lordship by Germanic law and one by Roman law. The starting-point of the former is the responsibility of the lord for his people. According to Germanic law, as above remarked, the house-master was responsible to third persons for those attached to his house. This responsibility extended not merely to bondsmen, but also to half-free and free persons. If a free but landless man remained for some time in the house of another, he acquired a relation of dependency which established the responsibility of

[1] C. 58. Cf. also Lex Rip. 70, 2: "Si quis autem fossam vel puteum fecerit, seu pedicam vel balistam incaute posuerit. . culpabilis judicetur."

[2] C. 61.

[3] C. 36.

[4] v. Amira, Nordgermanisches Obligationenrecht, i. 286.

[5] Bouteiller, Somme Rurale, i. 39.

[6] But as late as 1466 a counsel thus argued in England: "If I am building a house, and when the timber is being put up a piece of timber falls on my neighbor's house and breaks his house, he shall have a good action, etc.; and yet the raising of the house was lawful, and the timber fell, *me invito,* etc." (Fairfax, in the Thorn-cutting case, Y. B. 6 Edw. IV. 7, pl. 18).

[7] Deutsche Rechtsgeschichte (1892), II, § 93; see also I. 71, 98.

the house-master. . . . The liability of the master extended not merely over bondsmen living in the house, but over those settled on the land, and even over those elsewhere, so long as the master kept his ownership and no third person became responsible by receiving the man. . . . The responsibility of the master for free persons extended at least to those living in his house, followers and vassals not excepted. How far it extended without the circle of actual members of the household is doubtful. . . . For misdeeds of the bondsman the master originally bore full responsibility towards third persons. He had, as the party to the suit, to represent him and to render satisfaction for him. . . . The responsibility for free persons shows itself in the form of a duty upon the master to answer for the freeman's misdeeds." [1]

2. This responsibility disappeared in the case of freemen, as time went on, so that the master could relieve himself by handing them over to the regular courts; and this apparently worked a complete discharge. But in the case of serfs and domestics, the effect of a surrender was at first merely to relieve from the blood-feud and from the payment of peace-money; it put the situation on the footing of a "misadventure," as then conceived, *i. e.*, it left the master liable to pay compensation-money:

Kent Laws. — "If any one's slave slay a freeman, whoever it be, let the owner pay with a hundred shillings, give up the slayer, etc."

Lex Anglo-Werinorum.[3] — "Omne damnum quod servus fecit dominus emendet."

3. Then comes the usual step of allowing the value of the surrendered slave to be set off, and finally of complete exoneration by surrender of the slave; at first to the in-

[1] Further authorities on this primitive general notion are given in: Westermarck, Origin, etc. (cited *ante*, p. 476), pp. 30, 44, 60-70; G. Meyer, Zeitschrift der Savigny-Stiftung fuer Rechtsgeschichte, 1881, II (Germ. Abth.), pp. 83, 90, "Die Gerichtsbarkeit ueber Unfreie und Hintersassen nach aeltestem Recht"; P. Leseur, Nouvelle Revue historique du droit français et étranger, 1888, XII, pp. 576, 657, "Des conséquences du délit de l'esclave dans les Leges Barbarorum et dans les capitulaires"; Jastrow, Zur Strafrechtliche Stellung der Sklaven bei Deutschen und Angelsachsen, 1878, *passim* (No. 2 in Gierke's Untersuchungen zur deutschen Rechtsgeschichte).

[3] Thorpe, i. 27 29.

[3] C. 59.

jured family, then generally to the courts for justice to be done:

Lex Salica.[1] — The master pays one half the *wergeld* and, for the other, surrenders the slave.

Laws of Ine.[2] — "If a Wessex slave slay an Englishman, then shall he who owns him deliver him up to the lord and his kindred, or give 60 shillings for his life."[3]

LL. William I, c. 52. — "All who have servants are to be their pledges; if any such [servant] is accused, they [the masters] are to have him before the hundred for trial. If in the mean time he flees, the master shall pay the money due."[4]

4. And, accompanying the later form (complete exoneration), the master must usually swear an exculpatory oath denying any connivance with the deed; for the exoneration presupposes that the master had no part in the deed:

Chilperic.[5] — "Tunc dominus servi, cum VI [hominibus], juramento [affirmet] quod pura sit conscientia sua, nec suum consilium factum sit nec voluntatem eius, et servum ipsum det ad vindictam."

Lex Saxonum.[6] — He gives up or sets free the slave, and swears "se in hoc non conscium esse."

5. In Norman England we find this notion, "se in hoc non conscium esse," "pura conscientia," "nec suum consilium," distinctly reappearing in the idea that it made a difference whether the master consented to or commanded the harm done by the servant or other member of his household. But it is necessary, before risking a generalization, to set forth the available evidence:

[1] 35, 1; 35, 5. *Accord:* Pactus Alamannorum, iii. 17; Lex Frisionum, 1, 13 (slave for one third); Lex Bavariorum, 8, 2, 89 (for 20 s.).

[2] Laws of Ine, 74.

[3] The slave might, in a few communities, merely be set free (as with animals) and the responsibility thus disclaimed; but this was forbidden by a Carolingian capitulary as against peace and order, and persisted only in South France (Br., Pr. Ak., 832). As in the case of animals, the giving of nourishment after the deed was equivalent to a sanctioning by harboring (Br., Pr. Ak. 833).

[4] Bracton, De Legibus, f. 124 *b*, *accord.*

[5] Edict. Chilperic, c. 5.

[6] C. 18. *Accord.* Lex Frisionum, 1, 73; Knut, p. 75; Lex Alamannorum, 78, 6; Rothar (Lombards) 264, 342; Lex Salica, 35, 5 (later texts); Capitularia Ribuaria, Add. 5.

Maitland's Manorial Courts, I, 8 (A. D. 1246).[1] — "Isabella Peter's widow is in mercy for a trespass which her son John had committed in the lord's wood."

P. 9 (1247): "Roger the Pleader is at his law against Nicholas Croke, [on the issue] that neither he [Roger] nor his killed Nicholas' peacock."

P. 17 (1248): "Hugh of Stanbridge complains of Gilbert Vicar's son and William of Stanbridge that the wife of the said Gilbert, who is of his [Gilbert's] mainpast,[2] and the said William unjustly, etc., beat . . . And Gilbert and William come and defend all of it fully."

P. 96 (1279): "They say that the ploughman of Sir Ralph Rastel beat and ill-treated John Scot. . . . And one Thomas, the servant of the said Sir Ralph Rastel, by way of objection said that . . . the said John Scot beat and ill-treated the said ploughman. . . . The jurors say that J. Scot did not beat [the ploughman]. . . . Therefore the said Thomas is in mercy, 12 d."

PP. 149, 153, 154. — Court of the Fair of St. Ives (1275), Saturday, May 11: "Hugh of Swinford comes and complains of Thomas of Toraux, the Canvasser. . . . And the said Thomas comes and is charged and convicted of having by [his servant] Simon the Blake of Bury sold canvas by a false ell in his booth. And R. B., R. P., and J. G.[3] are associated with him in that booth." . . . Wednesday, May 15: "Let all the merchants . . . be summoned to come to-morrow before the steward to adjudge and provide that Thomas of Toraux, R. B., R. P., and J. G., merchants selling canvas, have justice and equity in the matter of Simon the Blake of Bury, servant of said Thomas and his fellows, who was found in their booth measuring canvas with a false ell and selling it. Pledge for Thomas' appearance, all his goods." . . . Thursday, May 16: "For that Simon the Blake of Bury was found, etc., . . . the said merchants as well as the said Simon were accused as consenting to the said iniquity, and the said Thomas and his fellows named above have offered to prove . . . that they are not guilty thereof . . . and for that the said Simon confessed . . . it was ordered that his body be arrested. . . . And the said merchants give 40*s*. to the lord for his grace and favor."[4] In a later suit (p. 155) by Simon's lawyer, it appears that

[1] Selden Society, vol. II.

[2] Household.

[3] Abbreviations are here made where feasible.

[4] It does not appear whether the merchants were found by the jury to have consented; but if the confession of Simon, as set forth in the next paragraph, was taken as true, then they must have so found. The accusation implies that consent was necessary.

Simon "confessed in full court that he received the said rod by the hand and bailment of one Thomas of Toraux, merchant of Rouen, whom he thereof vouched to warranty," and that he was "not to withdraw himself from his plaint, but was to press his suit against the said Thomas;" yet he did withdraw his voucher.

Court Baron, 36 (1250-1300 A. D.).[1] — William of Street's Case: Charge against one who sent his son in to take fruit from the lord's tree; denial that the son ever did so at his bidding: "William (saith the steward) at least thou canst not deny that he is thy mainpast,[2] nor that he was seized in the lord's garden . . . ; how wilt thou acquit thyself that thou didst not make or bid him do this?" "Sir, for the deed of my son and the trespass I am ready to do thy will, and I ask thy favor. My pledges are, etc." "But how wilt thou acquit thyself of the sending and bidding?" "In such wise, sir, as this court shall award that acquit myself I ought."

P. 38: William Lorimer's Case; charge of sending two men to cut stubble in E's field; denial, "never did such persons by his sending or bidding cut the stubble of that place nor carry it thence." So also Walter Coket's Case, p. 39. In another case of William Lorimer's, p. 55, he answers, "to prove that never did my folk, J. and T. by name, cut the stubble of that place by my commandment, nor carry it off, I am ready, etc." But in an alternative version, he denies that J. and T. were his mainpast, alleging that they were only laborers hired from day to day. Apparently either defence was good.

P. 53: "William of E., thou art attached to answer in this court wherefore thy son who is thy mainpast entered the lord's garden over the walls, etc. . . . Sir, [to prove] that never was any manner of fruit carried off by me, I will do whatever this court shall award that do I ought. — William, at least thou canst not deny that he was found inside and carried off divers kind of fruit at his will. — Sir, 't is true; wherefore I put myself in mercy."

Bracton's Note-Book. — II, 596, No. 779 (A. D. 1233): An assize of novel disseisin by Simon against John. J. did not come, but "William of L., his bailiff, came and said, for J., that if any disseisin was done it was not done by him, because he does not avow [*i. e.* sanction] the deed, nor, if it was done by his men, did any one come to him to lay it before him [*ostendere*] so that he might make amends [*corigeret*]." And Simon replies, and ends by saying that "he sent to John asking that he should make amends [*emendaret*] and he re-

[1] Selden Society, vol. IV (ed. Maitland and Baildon).
[2] Household.

fused to make amends." Ultimately John wins, "because he did no disseisin."

Ib., II, 600, *No.* 781 (A. D. 1233): An assize of novel disseisin by Ralph Basset against the Abbot of Kirkstede, for ploughing over the line of their fields, which adjoined. The Abbot denies any disseisin, and says, "that if his lay-members did anything there, this is not by him, and if it were so [*i. e.* that they had done harm] and it had been laid before him, he would have caused amends to be made [*emendari*], but if anything was done it was not laid before him, and therefore he says that *he* (*ipse*) did no disseisin if any was done." Then Ralph answers "that the Abbot well knew of it and it was laid before him, and the grain was carried off to the Abbot's own grange." The jury find that the ploughs of the Abbot did plough two or three feet over the line; and "on being asked whether the Abbot knew of this, they say that they cannot tell, but they do know well that the monks and the lay-brethren of the Abbot were there to see that it was done [? *ad visum faciendum*]; and since they did not lay it before the Abbot, the Abbot should fall back upon them [*capiat se ad eos*], for they ought to inform him of the affair. And because the jury say that the field was so ploughed and that there are no boundaries and that the Abbot last year had the grain carried off, it is adjudged that . . . the Abbot be in mercy; damage, 5*s*." The jury here were asked if the Abbot knew of the deed; yet he lost the case, though the jury could not tell; and the annotator (an early hand) writes on the margin: "Note that if one's bailiffs and servants do not lay it before their master that a disseisin has been done, the master is not excused though he says that he knew nothing of it, inasmuch as his men knew of it. So also of monks rendering obedience."

Ib., II, 471, *No.* 616 (A. D. 1231): In an action for taking the plaintiffs' nets and preventing them from fishing, the defendants are asked "whether they themselves avow [*i. e.* are ready to answer for] the taking, or whether they did the taking by authority of the Abbot of S. Edmund's, whose men they are, and they say that they took the nets of their own authority and avow the taking." [1]

Bracton De Legibus. — *f.* 204 *b:* After dealing generally with the topic of disseisin, and passing to actions for disseisin by servants, he says: "But if they [the masters] have

[1] Cf. also Bracton, N. B. III. 131, No. 1114 (A. D. 1234-1235), where the Prior of St. Swithin was summoned for having a gallows, etc., and violating royal privileges, and answered as to one charge, describing how the men of the place caught a notorious robber and murderer "et illum suspenderunt," but says "quod factum illum non advocat;" yet the defence was here insufficient, "et Prior in misericordia."

disavowed the deed of their men, and, when they shall have been sued in any respect by any man or in any mode, they shall not have made amends [*emendaverint*], they are still liable, so long as they are present [1] and have freely placed themselves on the assize, although they are not named in the writ. But, if they shall have made amends for the deed of their men, whether before demand or after, as long as it was before the taking of the assize, they shall free themselves and their men from the penalty of the disseisin. But if the masters are occupied in parts remote, so that they cannot be made parties, and if they have not known anything about the disseisin, for this reason the assize [2] shall not be stayed." Here it seems that the avowal or disavowal affects merely the liability to a fine, and the duty to make compensation is assumed as invariable. Almost the same principles are further expounded at f. 171 *a* and f. 172 *b*. So also 158 *b*, as to distraints by the servant of a lord: "It must be inquired of the master whether he has avowed the deed of his servants or not; and if not, then the master will have an opportunity to make amends; but if he has avowed it or has not made amends, he makes the wrong his own, if there was a wrong."

We see here going on the process of a general leavening by the principle of "se in hoc non conscium esse;" and apparently we are safe in concluding that by the end of the 1200s the general civil rule was still as indicated by Bracton's statement on the particular topic of disseisin. In other words, so far as any penal results were concerned, the master could pretty generally [3] exonerate himself by pleading that he had not commanded or consented to the act; [4] while nevertheless this was only a growing exception to a responsibility which the moral sense of the community was still inclined to predicate generally, and accordingly the liability to make good any harm done — *i. e.* the civil liability — still continued without regard to command or consent. As we shall see later, the test of command or consent was soon after extended generally to a civil liability; and even in the 1200s

[1] In court.

[2] Against the servants.

[3] But for some time exceptions remained: Fitzherbert, Abridgment, "Corone," 148 (1315).

[4] This seems indicated by the questions of the steward in the Court Baron cases (with one exception) and the inquiry at the Fair of St. Ives; for in those cases the penal idea would apparently predominate. So also in local customs: Bateson, Borough Customs, I, p. 62 (Selden Soc. Pub. vol. XVIII, 1904).

we seem to see it coming. Yet as that century was not thoroughly conscious of the distinctions "civil" and "criminal," [1] it can only be said that, at the point to which we have now traced the topic, we find that the test of command or consent was applied in some cases and not applied in others, the general notion being that absence of command or consent excused from correctional or penal consequence.[2]

[1] Notwithstanding Glanvil's and Bracton's use of the terms "placita criminalia" and "placita civilia."

[2] The situation in the twelfth and thirteenth centuries is somewhat complicated by the responsibilities involved in the frank-pledge police regulations. But there can be no doubt on the evidence that there was a general Germanic notion of responsibility for servants, related closely to the clan or kinship-responsibility which was universal in primitive law, but preceding and independent of the system of communal responsibility known as frank-pledge (whether it was or was not a direct successor of frithborg). This being understood, the authorities of the thirteenth century, rightly read, do not give us any reason to doubt that the responsibility for one's household was (though in actual content not dissimilar) in history and in popular feeling a distinctly different thing from the responsibility for one's neighbors in the tithing (frank-pledge). Thus Bracton (*f.* 124 *b*), after declaring that the tithing is not responsible for persons not required by law to be in frank-pledge, says that in such case that one shall be responsible in whose household he is, "nisi consuetudo patriæ aliud inducat," as in Hertford, where one is not responsible "pro manupastu [household] suo," unless by harboring an offender. Then, after describing the application of the rule to bishops, etc., and their duty to produce their servants to the court or pay a forfeit, he continues, "and so it shall be done for all others who are in anybody's household, because every man, whether free or serf, either is or ought to be in frank-pledge *or* in some one's household" (the italics are the writer's). He then reproduces the old Germanic ideas (LL. Hlothar and Eadric, c. 15) as to "household," — "receiving food or clothing from him, or only food with wages, . . . and according to ancient custom he may be said to be of one's family who has been given hospitality for three nights." (Cf. also Selden Soc., Pl. Cr., i. No. 55 (A.D. 1202): "William of Morton and Simon Carpenter are outlawed. . . . They were nowhere in frank-pledge, but servants of the Abbot of Woburn;" Bracton, N. B. iii. 563, No. 1724 (A. D. 1226): "Henricus le Ireys captus . . . non est in decenna [tithing], nec habet dominum qui eum advocet, . . . suspendatur;" also Ib. ii. 116, annotator, and footnote 1; Gneist, Const. Hist. Eng., i. 185; Bracton, De Legibus, 153 *b*.) It seems clear, then, that there is nothing which should induce us to believe that the responsibility for servants was not a perfectly clear and natural one apart from frank-pledge. When we meet such expressions as "omnes qui servientes habent, eorum sint franc-plegii" (LL. Wm. I. c. 52; Thorpe, i. 487), and "if the servant of any lord . . . commits a felony, . . . [the lord] is to be amerced, and the reason is because he received him in bourgh [pledge]" (Fitzherbert, "Corone," 148), we see that we are dealing with expressions used either by way of analogy (the responsibility being in both cases practically the same) or at a later date in ignorance or in disregard of the former distinctions. Compare the fellow-burgess responsibility in towns (Bateson's Borough Customs, ii, introd. p. xxiv, Selden Soc. vol. xxi, 1906).

In tracing these topics to this stage, two things must be noted with reference to the sources from which we thus arrive at a knowledge of the root Germanic idea: (1) It is not an absolute and unvarying idea. It was not uniformly and invariably dominant, and there were of course exceptions more or less notable. Possibly one of these obtained in the case of fire kept in one's house and accidentally resulting in a conflagration;[1] this we shall consider later. But on the whole the popular ethico-legal sentiment was of the content above set forth. (2) The various stages of the idea's development, as already remarked, cannot be plainly pieced out for each of the Germanic communities; nor can it be asserted that for the whole race the development went on with any homogeneity of time and incident. What can be affirmed is merely that the idea, in the various communities and at various epochs, passed through stages such as those indicated.

II[2]

We have now reached the stage when the notions of tortious civil responsibility, as developed in the newly organized Anglo-Norman courts, may begin to be traced separately from those of criminal responsibility. Here the process begins to be more complicated. The groupings thus far assumed for convenience — harm from (*a*) a personal deed, (*b*) an animal, (*c*) an inanimate thing, (*d*) a servant or agent — must here be abandoned, and the line of tracing must be accommodated to the groupings which are most marked in the precedents of 1300-1800; the effort in hand being always to make out the subjective course of legal thought in its progress towards the accepted standards of to-day. The topics then may be followed down in this order: 1. Harm done Unintentionally and Personally; 2. Harm done in Self-defence; 3. Harm done by an Infant or a Lunatic; 4. Keeping of Fire; 5. Keeping of Animals, with reference to (*a*) land trespasses, (*b*) trespasses by biting, etc.;

[1] Brunner, D. Rg., ii. 657-658.

[2] This and Part III are reversed from the order of the original article.

6. Keeping of Dangerous Things in general; 7. Harm done by a Servant or Agent.

1. *Harm done Unintentionally and Personally.* — Here, about the 1200s, the responsibility was still absolute, and irrespective of personal blame in producing the harm. In homicide, at least, the slayer by misadventure forfeited his goods and paid some fine or fee to the king, though his life was spared; while in probably all torts the harm-doer paid some compensation to the injured party. What we have to note is, first, that no distinction as to negligence or the like was yet made; it was either "misadventure," "unwitting," — that is, not intentional, — or wilful, intentional. Secondly, we note that the state of things still corresponded in essence with prevailing ethical notions; the man was getting fair dealing as far as the standards of the time went. Our object must be to discover how and when the notion got away from these tests.

The first circumstance we perceive is that the penal law was already getting away from them, as is shown by the sparing of the life; and as the purposes of a penal law became more and more clearly realized, we may suppose that the penal treatment grew less and less rigorous as time passed; though the forfeiture remained, in name at least, even in Blackstone's time. But a distinction was early made between penal and civil consequences, as the Thorn-Cutting case indicates.[1] This rested probably on the ground, still very properly accepted, that "in all civil acts the law doth not so much regard the intent of the actor as the loss and damage of the party suffering."[2] But to-day in torts we do certainly consider, not merely the sufferer's damage, but the blamableness of the defendant's conduct; while no such distinction was yet made, in the 1300s, even in cases of mere "misadventure." We have still therefore to trace the transition in this respect.

Now, it has been generally supposed that until the present

[1] Y. B. 6 Edw. IV, 7, 18 (1466): Fairfax, for the plf., "I say there is a diversity between an act resulting in a felony and one resulting in a trespass, for . . . when it was against his will, it was not *animo felonico*."

[2] Lambert *v.* Bessey, T. Raym. 421 (1681).

century (earlier in this country,[1] later in England[2]) the old notion continued, *i. e.* that the rationalization never proceeded any further than to posit a voluntary act by the defendant; that if from a voluntary act a Trespass — that is, a direct and immediate injury — followed, nothing could save the defendant from civil responsibility.[3] And no doubt this came to be at least the preliminary test, the *sine qua non*, showing itself most prominently in the rule of pleading that if there had been no such voluntary act, then there was not even a *prima facie* Trespass.[4] But more than this the whole course of precedents and of contemporary legal opinion does not allow us to believe. The evidence seems plain that the rationalization towards the present standards began at a much earlier period than has been supposed.[5] In other words,

[1] Vincent *v.* Stinehour, 7 Vt. 62 (1835), Harvey *v.* Dunlop, Hill & Den. Suppl. 193 (1843), Brown *v.* Kendall, 6 Cush. 292 (1850).

[2] Stanley *v.* Powell, *infra.*

[3] See, for example, the language of Grose, J., in Leame *v.* Bray, *infra;* the argument for the defendant in Holmes *v.* Mather, *infra;* Lord Cranworth, in Fletcher *v.* Rylands, L. R. 3 H. L. 330: "When one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer;" and 5 Harv. Law Review, 36: "The rule, so well settled in America, that inevitable accident is a good defence to an action of trespass for personal injuries, has not hitherto found entire favor with the English courts. There crept very early into the English law a principle, which the Courts have been slow to repudiate, to the effect that he who acts voluntarily acts at his peril, and is responsible for personal injuries to another resulting from his acts, though the injury be the outcome neither of wilful wrong-doing nor of negligence. The few cases in which a defence has been allowed have been decided either upon principles of expediency or upon questions of pleading. . . . The English judges have obstinately refused to adopt squarely the reasoning of the American courts, that where a man uses due care he is not responsible for results which could not have been foreseen, and, while practically arriving at the same results in a number of cases, have based their decisions upon narrow and unsatisfactory grounds."

[4] Gibbons *v.* Pepper, 1 Ld. R. 38; Knapp *v.* Salsbury, Boss *v.* Litton, Goodman *v.* Taylor, Hall *v.* Fearnley, *supra.*

[5] Following is a chronological list of the principal precedents showing the transition: 1330, Fitzherbert, Abridgment, "Corone," 302, 354; 1400, Beaulieu *v.* Finglam, Y. B. 2 H. IV, 18, 6; 1466, Thorn-Cutting Case, Y. B. 6 Ed. IV, 7, 18; 1506, Tithe case, Y. B. 21 H. VII, 27, 5; 1605, Millen *v.* Fandrye, Popham 161; 1616, Weaver *v.* Ward, Hobart 134; 1630, Bacon, Maxims, No. VII; 1681, Lambert *v.* Bessey, T. Raymond 421; 1682, Dickenson *v.* Watson, T. Jones 205; 1700, Mason *v.* Keeling, 12 Modern 332; 1716, Hawkins, Pleas of the Crown, I, c. 28, § 27; 1724, Underwood *v.* Hewson, 1 Strange 596; 1760, Buller's Nisi Prius, 6th ed., 16; 1767, Beckwith *v.* Shordike, 4 Burrow 2092; 1770, Davis *v.* Saunders, 2 Chitty 639; 1773, Scott *v.* Shepherd, 2 Wm. Bl.

there has never been a time, in English law, since (say) the early 1500s, when the defendant in an action for Trespass [1] was not allowed to appeal to some test or standard of moral blame or fault in addition to and beyond the mere question of his act having been voluntary; *i. e.* conceding a voluntary act, he might still exonerate himself [2] (apart from excuses of self-defence, consent, and the like). At first this test, naturally, was vague enough. "Inevitable necessity," "unavoidable accident," "could not do otherwise," served indiscriminately to express, in judicial language, the reasons of fairness on which they equally exempted him who had intentionally struck in self-defence, and him who had unintentionally injured without what we now call "negligence," and him who intentionally trespassed on the plaintiff's land to avoid a highway attack.[3] The phrases, "non potuit aliter facere" and "inevitable necessity," served as leading catchwords for

892; 1773, Barker *v.* Braham, 3 Wilson 368; 1793, Comyn's Digest, 4th ed., "Battery," (A); 1794, Ogle *v.* Barnes, 8 T. R. 188; 1797, Bacon's Abridgment, "Trespass," (D), (I); 1799(?), Espinasse, Nisi Prius, 3d ed., 313; 1800, McManus *v.* Crickett, 1 East 109; 1803, Leame *v.* Bray, 3 East 593; 1806-8, Selwyn, Nisi Prius, 1328; 1808, Chitty, Pleading, 128; 1810, Milman *v.* Dolwell, 2 Camp. 378; 1810, Knapp, Salsbury, 2 Camp. 500; 1823, Wakeman *v.* Robinson, 1 Bing. 213; 1832, Boss *v.* Litton, Goodman *v.* Taylor, 5 C. & P. 407, 410; 1834, Pearcy *v.* Walter, 6 C. & P. 232; 1837, Cotterill *v.* Starkey, 8 C. & P. 691; 1842, Hall *v.* Fearnley, 3 Q. B. 919; 1849, Sharrod *v.* R. Co., 4 Exch. 585; 1870, Smith *v.* R. Co., L. R. 6 C. P. 14; 1875, Holmes *v.* Mather, L. R. 10 Exch. 261; 1891, Stanley *v.* Powell, 1 Q. B. 86.

[1] For a qualification as to trespasses to realty and to personalty, see *post*.

[2] Originally the distinction requiring this to be done by an affirmative plea in justification seems not to have prevailed.

[3] Bracton's Note-Book, III, 229, No. 1216 (A. D. 1236-37), where in a killing in defence he is pardoned, the test being "quia non potuit aliter evadere manus eius;" ib. III, 107, No. 1064 (A. D. 1225), "aliter enim mortuus esset;" (1319) Y. B. 12 Edw. II, 381, "since the defendant could not otherwise escape;" (1459) 37 H. VI, 37, pl. 26, the defendant trespassed to avoid the attack of the plaintiff on the highway; held justifiable, "because he could not do otherwise than this;" Choke, C. J., in Thorn-cutting case (1466): "As to what was said about their falling in, *ipso invito*, that is no plea, but he ought to show that he could not do it in any other way, or that he did all that was in his power to keep then out;" see also Catesby, *arg.;* Britton (Nichols), I, 15, "from necessity to avoid death;" Bacon, Maxims, V, "impossible to do otherwise;" Blackstone, J., in Scott *v.* Shepherd: "Not even menaces from others are sufficient to justify a trespass against a third person . . . nothing but inevitable necessity," citing Weaver *v.* Ward, Dickenson *v.* Watson, Gilbert *v.* Stone; counsel in Gibbons *v.* Pepper, 4 Mod. 405, "for it was no neglect in him, and the mischief done was inevitable;" and the other cases cited *supra*, note 5.

many centuries; and even up to the 1800s we find Court and counsel constantly interchanging "inevitable accident" and "absence of negligence or blame."[1] The precedents show us, then, that somewhere about 1500 a decided sloughing-off of the last stage of the primitive notion took place, and a defendant could exempt himself in this sort of an action if his act, though voluntary, had been without blame; the standard being more indefinite, and perhaps not as liberal, as today, but not different in kind.[2] But it would seem that towards the latter half of the 1800s the opinion at the bar in England misconceived the language of some of the earlier cases,[3] and it became necessary to review them in two cases (Holmes *v.* Mather, 1875; Stanley *v.* Powell, 1891), in which the doctrine was finally settled, for England, that the defendant's attention to the requirements of due care may be (not necessarily always is) a defence, even where a trespass has been done. The same doctrine ("there must be some blame or want of care and prudence to make a man answerable in trespass") had long before been laid down in this country, and that, too, purely as a matter of the right reading of the precedents.[4]

[1] Buller's Nisi Prius, "that it was inevitable, and that he committed no negligence;" Comyn, "inevitable and without any neglect;" Espinasse, "involuntary and without fault;" Lord Denman, in Boss *v.* Litton, "inevitable accident," *i. e.* "one which the defendant could not prevent;" Patteson, J., in Cotterill *v.* Starkey, to the same effect; Nelson, C. J., in Harvey *v.* Dunlop, Hill & Den. Suppl. 193 (1843), "from inevitable accident, or which in law or reason is the same thing, from an act that ordinary human care and foresight are unable to guard against;" Center *v.* Finney, 17 Barb. 94 (1852), "wholly unavoidable and no blame imputable;" Selden, J., in Dygert *v.* Bradley, 8 Wend. 470 (1832), "When we speak of an unavoidable accident, in legal phraseology, . . . all that is meant is that it was not occasioned in any degree, either remotely or directly, by the want of such care or skill as the law holds every man bound to exercise;" and the other cases cited *supra*, note 5, p. 505.

[2] The same differentiation of misfortune from negligence may be seen progressing in the law of tenant's liability for waste; here it had become plainly announced by the 1500s: Kirchwey, Liability for Waste, Columbia Law Review, VIII, 625, 627 (1908).

[3] Probably owing chiefly to the expressions of Grose, J., in Leame *v.* Bray, *supra*, note 5, p. 505. These, taken apart, appeared to support, and perhaps were intended by him to support, the stricter view. The other and later cases show that Lord Ellenborough (also a judge in Leame *v.* Bray) did not hold it.

[4] See Vincent *v.* Stinehour, Harvey *v.* Dunlop, and other American cases cited *supra*, notes 1, pp. 505, 507.

In trespasses to personalty[1] and to realty there had originally been a disposition, at the time the general tendency to mitigation began, to carry it out in this field also. For instance, Rede, C. J., in 21 H. VII, (1506),[2] declared that "where the executors take the goods of a stranger with those of the testator, they are excusable for the taking in trespass," because "one cannot *prima facie* know perfectly which goods belong to the testator and which to the stranger;" and the excused trespass of the oxen in 22 Edw. IV, (1483) 8, 24,[3] seems to rest on a similar notion; while Choke, C. J., shows it clearly in the Thorn-cutting case (1446).[2] But this tendency soon disappeared,[4] probably for reasons of policy, which are still accepted as valid;[5] and no such defence is now admissible, except in trespasses or conversions of personal property under exceptional circumstances.[6]

2. *Self-defence.* — Here, as we have already seen, the Statute of Gloucester (1278) provided that, in crown cases, the slayer in self-defence (though forfeiting his goods) should receive a pardon by the king's favor if he pleased.[7] Yet the practice as to a pardon varied, for in two of these cases (1302, 1349) the defendant was apparently set free immediately.[8] By 1624 the forfeiture was not required.[9] In civil actions of trespass, however, the mitigation was longer in coming. In 1294[10] and in 1319[11] the defendant was obliged to respond; but in 1400,[12] and ever since, the plea is accepted

No doubt the doctrine of "acting at peril" to-day still covers the situations involved in some of these cases; for this see *post* in this article.

[1] Including cases where to-day trover would lie.

[2] Cited *supra*, note 5, p. 505.

[3] *Post*, p. 515, note 1.

[4] Basely *v.* Clarkson, 3 Lev. 37 (1681). But it perhaps lingers in Beckwith *v.* Shordike, *supra*, note 0.

[5] See Holmes, The Common Law, 151.

[6] *E. g.* Wellington *v.* Wentworth, 8 Metc. 548.

[7] The earlier cases of this sort are: (1302) Y. B. 30-31 Ed. I, 513 (Rolls ed.); (1338) Y. B. 12 Ed. III, 533 (Rolls ed.); (1338) Y. B. 21 Ed. III, 17, pl. 22; (1349) Fitzh. Abr., "Corone," 261; (1370) ib., 94; (1368), 41 Ass. 21 (appeal of mayhem).

[8] A pardon was required as late as 1489 (Fitzherbert, Abridgment, "Corone," 61).

[9] Dever's Case, Godbalt, 288.

[10] Y. B. 21-22 Ed. I, 586 (Rolls ed.).

[11] Y. B. 12 Ed. II, 381 (Rolls ed.).

[12] Y. B. 2 H. IV, 8, pl. 40.

as a complete defence.[1] Yet its whole scope was not fully realized at first. For instance, in the very case preceding that of 1302, in which the defendant was set free for killing a wheat-thief in self-defence, the defendant (in a crown case) who killed a wheat-thief in defence of his brother was sent to prison;[2] and in 1436,[3] when it was agreed that in all justice "it is lawful for a man to aid his master," it seems to be a case of first impression.

3. *Lunatics and Infants.* — The natural result of the primitive notion would be to hold the lunatic liable, no less than the slayer by misfortune; and in fact the two stood at this time on the same footing:

> "It was presented that a certain lunatic wounded himself with a knife, and, after he recovered from his infirmity [lunacy] and received the rites of the church, he died of his wounds; his chattels were confiscated" (1315).[4] In 1330 a lunatic homicide is given a king's charter of pardon.[5]

But the popular superstitions in such matters prevented as rapid an approach as might have been expected towards a rational treatment, even in criminal cases, of lunatic harmdoers. It would seem that a similar inability to make allowances served for a long time as in part a basis for tortious responsibility; though doubtless as much or more influence is to be attributed to the maxim, so powerful in the sphere of deeds and contracts, that "no man of full age shall be, in any plea to be pleaded by him, to be received by the law to stultify himself."[6] However, by Lord Bacon's time, the principle was maintained in the form that a lunatic was responsible for his torts in the same way as an ordinary person.[7]

[1] So also in the borough courts in the 1400s (Bateson's Borough Customs, I, 53, and II, Introd. p. 40; Selden Soc. vols. XVIII, 1904 and XXI, 1906), where the learned editor is therefore hardly correct in commenting that at that time "by the law of the land nothing less than the King's pardon would suffice."

[2] Y. B. 30-31 Ed. I, 518 (Rolls ed.).

[3] 14 H. VI, 24, pl. 72.

[4] Fitzh. Abr., "Corone," 412 (1315).

[5] Ib. 351.

[6] Beverley's Case, 4 Coke R. 123 *b* (1603).

[7] Bacon, Maxims, VII (1630); Weaver *v.* Ward, Hobart, 134 (1616).

The development was quite otherwise with the responsibility of Infants. In Germanic custom the male child was without a standing in the community as an obligor or an obligee. Like the master for the slave, the father answered for and made claims on behalf of the child.[1] The ceremony of investing him with arms as a *wehrhaft*, or weapon-bearing, member of the community, was the usual period for the assumption of rights and liabilities; and this customarily (not always) took place at the age of twelve. Hence we find, in Anglo-Norman days, the age of twelve years as the earliest at which liability can begin.[2] We soon see, however, a tendency to reduce this age-limit,[3] and the twelve-year rule came to be disregarded in criminal cases;[4] while a seven-year limit appears in later criminal law as the subject of a presumption against criminal intent.[5] The case of 35 H. VI, 11, pl. 18 (1457) is usually given as the first in which an infant was held liable in Tres-

[1] See Brunner, Deutsche Rechstgeschichte, I, 76; Wackernagel, Die Lebensalter, 1862, p. 46; and some references to Anglo-Saxon laws in Hale's Pleas of the Crown, I, 20 ff. Notice the same notion of legal disability in one of the two forms of the writ of pardon for infants in the Registrum Brevium (309 *b*), where the infant is discharged, but is to come up again and answer, if any one raises the question after he has arrived "ad legitimam ætatem."

[2] Y. B. 30-31 Ed. I, 529 (Rolls ed.); a boy had set up a mark inside the house, and in shooting, his arrow accidentally went without and killed a woman; Justiciarius: "Since he is not of the age of twelve years he is not a felon, but good and loyal;" and as he had absconded, it was publicly proclaimed that he might return if he would.

[3] 1302, Y. B. 30 Ed. I, 511 (Rolls ed.); one who killed in defence of his brother was committed to prison; and it was said that he was under twelve years of age; Spigurnel, J.: "If he had done the deed before his age of seven years he should not suffer judgment; but if he had done any other deed not causing the loss of life or limb, though against the peace, he should not answer, because before that age he is not of the peace."

[4] 1338, Y. B. 12 Ed. III, 627 (Rolls ed.): "Itan, a girl of thirteen years, was burnt for that while she was the servant of a certain woman she killed her mistress; and this was [so] found; therefore adjudged to be treason. And it was said that by the old law no one under age was hung, or suffered judgment of life or limb. But Spigurnel found a case that an infant of ten years killed his companion and concealed him, and he was hung, since by the concealment he showed that he knew how to distinguish between evil from good. And thus *malitia supplet ætatem.*" So also in the borough courts, A. D. 1200-1400 (Bateson's Borough Customs, I, p. 63, II, Introd. p. 42; Selden Soc. Pub. vols. XVIII, 1904, and XXI, 1906), where the parent is often held answerable; yet there is no consistent principle visible.

[5] Reg. *v.* Smith, 1 Cox Cr. C. 260.

pass.[1] But the language of the Court there shows (the penal idea being still at that time attached to the idea of a trespass) a disposition to exempt the infant; and the reason given for refusing to discharge him as incapable of discretion (that the possibility of a plea of justification takes the power from the Court) does not put the case on any ground of the immateriality of intention. Moreover, in 1611[2] it was resolved by the Court that a writ of *capiatur* would not be issued in an action of *vi et armis* against an infant; and in Temp. Car. I.[3] an action of Case for slander against an infant was sustained on the ground that *malitia supplet ætatem.* However, about this time we find infants ranked with lunatics as liable civilly on the general ground that the intent (*i. e.* bad intent, bad motive) was immaterial.[4]

4. *Keeping of Fire.* — Here the old responsibility, in its strictest form, continued down to Queen Anne's reign, and for almost the whole period, we may believe, it was sanctioned by popular notions.[5] The short name of the action ("for negligent garder son feue") is a misleading one; it means merely "for *failing* to keep in his fire," and the responsibility was absolute, as may be seen from the words of the writ[6] ("quare . . . homo et femina . . . ignem suum die ac nocte

[1] The child was four years of age; the judge says: "Can you find it in your conscience to declare against this child of so tender an age? I think that he did not know any malice, for he is not of great strength, and you can see that before your own eyes." Counsel replies that the fact remains that one of his client's eyes is out. Counsel for defence claims that, as in felony, the Court can dismiss the case if they think his youth shows that he did not know he was doing wrong. But Moyle refuses, because in felony there is only a plea of not guilty, and no justification, and so "the justices have it in their discretion to dismiss him if it appears to them that he is of such an age that he has not discretion; but otherwise in trespass, for in a writ of trespass the party may justify the trespass, and not plead not guilty, and so the justices have no such power." Then a guardian is appointed, and the defendant's counsel is granted an adjournment for a conference.

[2] Holbrooke *v.* Dagley, Croke Jac. 374.

[3] Hodsman *v.* Grissell, Noy, 129.

[4] Bacon, Maxims, vii.

[5] Bateson, Borough Customs, I, 82 (Selden Soc. Pub. vol. XVIII, 1904); here the later custumal exonerates. The same popular attitude seems to have lingered in other countries; *e. g.* in Japan the responsibility for accidental fires continued, in the rural communities, into the present century; and during a residence in Tokyo the writer's landlord tried to have inserted in the lease a clause making the tenant responsible for all fires originating within the house.

[6] Rastell, Entries, 8.

salvo et secure custodire teneatur, ne pro defectu custodiæ," etc.), and from the proceedings in Beaulieu *v.* Finglam (1400),[1] where any question of blamableness is excluded.[2] The primitive idea is seen remaining in the argument there made and rejected, that "the fire could not be alleged to be *his* fire, because a man cannot have property in fire."[3] In Tuberville *v.* Stamp (1698)[4] the old tradition was still adhered to ("be it by negligence or by misfortune, it is all one"); though the intervention of a sudden wind-storm was treated as an available excuse.[5] In 1700[6] a similar action failed, apparently only by bad pleading; but in 1712[7] the responsibility for accidental fires in houses[8] was abolished by the Legislature.[9]

5. *Keeping of Animals.* — (*a*) In trespasses of animals by *biting* or otherwise *wounding*, we find the rule on English soil to be a lineal successor of the form already seen in the North French records,[10] that the owner "did not know the animal's vice." The three writs in the Register[11] begin by alleging that the defendant "quosdam canes ad mordendum oves consuetos apud B. scienter retinuit," "quondam canem

[1] 2 H. IV, 18, pl. 6.

[2] The case in 42 Ass. pl. 9 (1369), which the plaintiff lost, in an action where the jury found that the fire *fuit suddeinment illumine*, the defendant knowing nothing, is not conclusive to the contrary; for (1) it does not appear that the defendant set the fire; (2) Rolle (Abridgment, 1, pl. 2) thinks the *vi et armis* spoiled the writ; (3) 2 H. IV., *supra*, is unmistakable. For other cases, see (1450) 28 H. VI. 7, pl. 7; (1582) Anon., Croke El. 10; and also Rolle's Abr., Action on the Case, (B) Fire.

[3] So, also, in Tuberville *v.* Stamp, "The fire in his field is his fire as well as that in his house."

[4] 1 Salk. 13; Comb. 459; Skinner, 681; Carth. 425.

[5] The doubts there expressed because the fire was started in the field, not in the house, arose hardly from the fact that the tradition dealt only with fire in a house (for the writ does not betray this, nor does Germanic tradition), but from the fact that it was started by a servant, and the old rules about absolute responsibility for deeds done in the house and by the household became the source of confusion.

[6] Allen *v.* Stephenson, 1 Lutwych 36.

[7] 10 Anne, c. 14, s. 1.

[8] Extended by 14 G. III. c. 78, s. 86, and 7 & 8 Vict. c. 87, s. 1, to "estates."

[9] Blackstone (I, 131) and Lord Lyndhurst (1 Phill. Ch. Cas. 320) misunderstood "accidentally" to include "negligently" in these statutes. This was corrected by Philliter *v.* Phippard, 11 Q. B. 347 (1847); Bacon, Abr., Case, already had had the right interpretation.

[10] *Ante*, p. 490.

[11] Registrum Brevium, 110.

ad mordendos homines consuetum [1] apud L. scienter retinuit," "quondam aprum ad percutiendum animalia consuetum apud W. scienter retinuit." [2] Sometimes, especially for dogs, we find a modification of the old rule, the same in idea though somewhat different in form, intimating that liability ensued where the vice and the knowledge could not be shown, if the owner incited the animal to the trespass;[3] *i. e.* the same broad idea, of Command or Assent, as in the case of servants. The rule remained on this basis for several centuries,[4] though the form of the usual writ seems to have changed slightly.[5] By Lord Holt's time it was found desirable to rule that a *scienter* was not necessary in the case of animals "naturally mischievous in their kind;"[6] and his admirably concise statement of

[1] The writ reads "mordend*um*" and "consuet*os*," and the terminations should apparently be exchanged.

[2] Compare Selden Soc. vol. IV, Court Baron, 131 (1320): "[The jurors present] that the said John the Swineherd has a dog which ate a rabbit of the lord . . . And that a dog of the Vicar *often chases* hares in the field (fine 3*d.*) . . . And that the dog of John Manimester chased a sow of John Albin, so that he lost her pig, to his damage, taxed at 18*d.*, which the Court awards, etc., and John Manimester is in mercy (6*d.*)," also ib. p. 52. Here it seems that there was not always an allegation of the *scienter*, or even of the habit, in these lower courts.

[3] Britton (Nichols' ed.) I, 15: "Let it be inquired . . . [if the killing was] by a beast, whether by a dog or other beast, and whether the beast was set on to do it and encouraged to do such mischief, or not, and by whom, and do of all the circumstances." Fitzherbert, Natura Brevium, Trespass, 89, L: "And if a man do incite or procure his dog to bite any man, he shall have an action of trespass for the same;" following a writ for inciting dogs to bite sheep. In 3 Edw. III, 3, 7 (1330), a bill lays the "incitement" of the dogs to bite the sheep. See also 13 H. VII, 15, pl. 10 (1498).

[4] Buxendin *v.* Sharp, 2 Salk. 662 (1697); s. c. Bayntine *v.* Sharp, 1 Lutw. 36; Smith *v.* Pelah, 2 Stra. 1264 (1747). In Millen *v.* Fandrye, the Court seem to have had in mind mainly the land-trespass of the dog (Popham, 161). See Laws and Liberties of Mass. (1648), "Sheep" (Whitmore, 191): "If any dog shall kill any sheep, the owner shall either hang such dog or pay double damages for the sheep; and if any dog hath been seen to course or bite sheep before, not being set on, and his owner hath had notice thereof, then he shall both hang his dog and pay for such sheep;" re-enacted in General Laws of 1672, s. v. Probably in England, as here, the claim might always be based either on the habit plus the *scienter*, or merely on an incitement.

[5] "Quod retinuit quondam canem sciens canem predictum ad mordendum oves consuetum."

[6] 1700, Mason *v.* Keeling, 12 Mod. 332, Holt, C. J.: "If they are such as are naturally mischievous in their kind, he shall answer for hurt done by them without any notice; but if they are of a tame nature, there must be notice of the ill quality." The restriction of this rule to "things in which he has no valuable property," and the application

the rule has since prevailed, giving Courts nothing to do but apply it to varying circumstances; though even in this apparently simple task they have sometimes found that they had an elephant on their hands.[1]

(*b*) But for *land-trespasses* of animals the old strict liability continued in full force. Some indications appear of a tendency to impose a greater penalty for trespasses repeated after a first trespass has occurred;[2] but no such relaxation seems to have maintained itself,[3] and the principle was kept that "a man should so occupy his common that he does no wrong to another man."[4] In modern times, as we shall see, this rule has been rationalized with others under the principle that those who keep things likely to do mischief keep them at their peril.[5] There were but two modifications made. One was the decision, in a solitary case, that in turning the plough on adjoining land (as custom allowed) the owner was not liable for the trespass of the oxen in snatching a mouthful

of a stricter rule to things in which he has a "valuable property," seems to have been a passing invention of Holt, C. J., in distinguishing the rule as to cattle's trespasses on realty, and has no support in preceding literature. But it may have been inspired, as Mr. Justice Holmes suggests, by the old idea, already noticed, that animals let loose could not bring home responsibility to their former owner (The Common Law, 22).

It is necessary to express surprise at the insufficient historical treatment of this topic in Mr. T. Beven's article on "The Responsibility at Common Law for the keeping of Animals" (Harvard Law Review, 1909, XXII, 465). The learned writer's inattention to the distinction between trespasses by biting or wounding and trespasses q. c. f. explains in part his misunderstanding of the precedents.

[1] Filburn *v.* People's Palace Co., L. R. 25 Q. B. D. 258 (1890), where an elephant escaped.

[2] See Laws of Ine, c. 49.

[3] Fitzherbert, Natura Brevium, "Trespass," 87 A; Selden Soc. vol. II, Manorial Courts, I, 9: "Hugh Tree is in mercy for his beasts caught in the lord's garden. Pledges, Walter of the Hill and William Slipper. Fine, 6*d*." Accord., pp. 7, 10, 12, 13, 15, 18, 37, 90, 183; also 114: "one sow and five small pigs of John William's son entered the court-yard of Bartholomew Sweyn and did damage among the leeks and cabbages. . . . Therefore let John make satisfaction to him for the said 2*d*. and be in mercy for his trespass." These cases date from 1247 to 1294. Add Y. B. 27 Ass. 14, pl. 56 (1354).

[4] Y. B. 20 Ed. IV, pl. 10 (1481); "Doctor and Student," I. 9 (Muchall's ed., 31) (1518): "Every man is bound to make recompense for such hurt as his beasts shall do in the corn or grass of his neighbour, though he know not that they were there;" under the head of things which are doubtful upon the law of reason. Noy, Maxims, c. 44 (1642), borrows the same language.

[5] Blackburn, J., in Fletcher *v.* Rylands, *post*.

of grass, since "a man cannot at all times govern them as he will;" here the existence of such a custom was held a necessary element in the exemption.[1] The other was the exemption from trespasses of cattle who wander, when driven along the highway lawfully, provided the driver is present and not in fault and makes fresh pursuit.[2] This seems at first to have been granted in cases where the plaintiff was bound by custom to fence along the highway;[3] but in the 1800s this limitation disappeared, and such a duty now seems to play no part;[4] so that an English Court will now go so far as to exempt the driver (barring negligence) of the bull who breaks into the traditional china-shop,[5] — thus bringing true the law laid down by Doddridge, J., in 1605,[6] which, however, was probably not yet law in his day.[7]

With this history for the rule, it is in appearance strange that it should not have been applied equally to dogs as to other animals. The explanation seems to be that in the Germanic days, from which the traditions come down, the dog was not a domesticated animal, — was only a half-savage hanger-on in the human communities, as he is to-day in many parts of the world. Belonging to nobody, nobody was responsible for him;[8] and by the time man's relation to him could be said as a usual thing to be one of control or possession, the tradition was all against making his owner responsible (barring wilfulness) for his trespasses to land. Such

[1] Y. B. 22 Ed. IV, 8, pl. 24 (1483). But compare also 2 Rolle's Abr. 566 (1618): "If a man has a road along my land for his beasts to pass, and the beasts eat the grass in morsels in passing, this is justifiable;" adding, "this is to be understood as done against his will."

[2] Y. B. 10 Ed. IV, 7, pl. 19 (1471); Y. B. 15 H. VII, 17, pl. 13 (1502), *semble;* Fitzherbert, Natura Brevium, 128, notes.

[3] Rastel's Entries, 621, and cases just cited; Dovaston *v.* Payne, 2 H. Bl. 527 (1795). It was always an excuse that the plaintiff was bound, by agreement or by custom, to fence against the defendant; and the modification in question was apparently treated as merely one phase of this, the plaintiff being bound by custom to fence against the highway.

[4] Goodwyn *v.* Cheevely, 28 L. J. Exch. 298.

[5] Tillett *v.* Ward, L. R. 10 Q. B. D. 17 (1882).

[6] Millen *v.* Fandrye, Popham 161: "A man is driving cattle through a town, and one of them goes into another man's house, and he follows them, trespass does not lie for this."

[7] Danby and Moyle, JJ., in 10 Ed. IV, 7, pl. 19 (1471).

[8] Trained hunting-dogs and the like were the exception.

seems to have been the judicial attitude up to this century,[1] and not by any means on grounds of tradition merely; but although Victoria has reached a different result,[2] and although in this country Dog Acts have dealt decisively with the acts of a dog, the law of England on the subject cannot yet be said to be declared.[3]

6. *Sundry Acts; Acts at Peril.* We have now traced down to modern times sundry doctrines of Responsibility in the typical classes of acts found expressly regulated in the primitive law; and everywhere there has been more or less rationalization of the rules. In some classes (*e. g.* keeping cattle) the duty is made an absolute one for all in similar situations; in others the question of culpability is reopened as to due care in each case on its circumstances; but in all there has come to be assumed some degree of fault sufficient to amount to culpability. There are, however, numbers of acts not falling under the classes above traced; and the question arises, What has been, historically, the canon of Responsibility with reference to these? When did the Courts in these cases begin to base an action upon negligence alone, or upon some other test? We are here brought to the subject of the history of the Action on the Case for Negligence, so-called. But this is an inquiry too complex to be here taken up; a summary reference to its probable history must here suffice. Looking, then, at these sundry injuries (other than the above classes) as the Courts of several centuries ago must be imagined to have approached them, we find that they would probably have presented themselves in one of three aspects: (1) There was as early as the 1600s, and probably earlier, a principle that one who did an unlawful act (or one who committed a trespass)

[1] Millen *v.* Fandrye, Popham 161 (1605); Beckwith *v.* Shordike, 4 Burrow 2092 (1767); Brown *v.* Giles, 1 C. & P. 118 (1823).

[2] Doyle *v.* Vance, 6 Vict. L. R. (Law) 87 (1880).

[3] Read *v.* Edwards, 18 C. B. N. S. 260 (1864).

On the general subject, a comparison of the Colonial law is interesting: 1646-1660, Laws and Liberties of Mass., "Cattle," (Whitmore's ed. 131); the common-law rule is changed, and the owner of land must fence it against "great cattle;" but the *scienter* analogy is adopted for the new rule; "nor shall any person knowing, or after due notice given, of any beast of his to be unruly in respect of fences, suffer such beast to go . . . without such shackles or fetters as may restrain and prevent trespass;" but "for all harms done by goates there shall be double damages allowed."

was liable for all the consequential damage, when properly alleged as special damage.[1] (2) The principle *sic utere tuo ut alienum non lædas* was early familiar to the judges, and can clearly be traced even where it is given an English garb.[2] This was generally employed to cover the case of an injury caused by acts done on one's own land, but it was sometimes extended to cover the case of injuries by cattle. (3) For harm caused by a mere non-feasance, including many cases which we now subsume under Negligence, probably no action would lie.[3] The word *negligentia*, as used in earlier times, meant apparently (as has been seen in the action for fire) merely "failure to do" a duty already determined to exist; thus, though the Courts constantly said that "a man is bound to keep his cattle in at his peril," he is sometimes said to be held for "defaut de bon garde,"[4] — meaning, not careless keeping, but merely failure to keep as bound; and the misapprehension of this was probably the source of Blackstone's well-known misstatement that the action was for "negligently keeping" his cattle.[5] It seems, then, that the action on the case based on a mere negligent doing was of little or no consequence until the 1800s,[6] and that it then came about partly

[1] 1699, Parkhurst *v.* Foster, 1 Ld. Raym. 479; trespass against a constable for billeting a dragoon upon him, and forcing him to find meat, drink, etc.; the jury found that the dragoon was the one who forced the plaintiff, etc.; Holt, C. J.: "At common law, if a man does an unlawful act, he shall be answerable for the consequences of it, especially where, as in this case, the act is done with intent that consequential damage shall be done." 1773, Nares, J., and Gould, J., in Scott *v.* Shepherd, 2 Wm. Bl. 893: "Wherever a man does an unlawful act, he is answerable for all the consequences." See also Courtney *v.* Collet, 1 Ld. Raym. 272 (1698); Reynolds *v.* Clarke, 1 Stra. 634 (1722).

[2] Brian, J., in 20 Ed. IV, 10, pl. 10 (1481): "A man should so occupy his common that he does no wrong to another man." Holt, C. J., in Tenant *v.* Goldwin, 2 Ld. Raym. 1089 (1705): "Every man must so use his own as not to do damage to another;" and also in Tuberville *v.* Stamp, 1 Salk. 13 (1698). Gibbs, C. J., in Sutton *v.* Clarke, 6 Taunt. 29 (1815), approves this argument of counsel: "An individual is bound so to restrain the exercise of his rights over his own land that he may not thereby injure his neighbor."

[3] Compare the hesitation in granting assumpsit for a non-feasance.

[4] 27 Ass. 141, pl. 56. See also the action for keeping a ferocious dog, where "pro defectu curæ" is a part of the declaration, as in Mason *v.* Keeling, 12 Mod. 332.

[5] Commentaries, III, 211. Compare the sense of "negligence" in the precedents in Comyn's Digest, Action on the Case for Negligence.

[6] In Mitchil *v.* Alestree (1677), *e. g.*, the declaration alleged "improvide et absque debita consideratione ineptitudinis loci;" but this alle-

through the principle of consequential damage noted above, and partly through the growing application of the test of negligence in Trespass, as already indicated. But this suggestion is merely one made in passing; the essential point to note is that certain of the cases we have studied historically had become, in the 1800s, amenable to a generic test of Negligence, or Due Care under the Circumstances, which had somehow come to be applied to some other cases also. What we have still to notice is the fate of those remaining classes of cases which never became amenable to this test of Due Care under the Circumstances.

Briefly, they wandered about, unhoused and unshepherded, except for casual attention, in the pathless fields of jurisprudence, until they were met, some forty years ago, by the master-mind of Mr. Justice Blackburn, who guided them to the safe fold where they have since rested. In a sentence epochal in its consequences this judge co-ordinated them all in their true category: —

> "There does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbor; . . . the duty is the same, and is to keep them in at his peril."[1]

It is not that the phrase "at peril" was a novel one. On the contrary, it is an indigenous one and a classical one in our law.[2] Nor is it that no previous attempt had been made

[1] Fletcher *v.* Rylands, L. R. 1 Exch. at 282 (1866).

[2] Littleton, J., in 10 Ed. IV, 7, pl. 19: "It is at the peril of him who drives;" Doctor and Student, II, 16 (p. 149): "When a man buyeth land or taketh it of the gift of any other, he taketh it at his peril;" ib. II, 27 (pp. 191, 192); Mitchil *v.* Alestree, in 3 Keb. 650: "Per Curiam: It's at peril of the owner to take strength enough to order them;" Holt, C. J., in Anon, 12 Mod. 342; keeping gunpowder; action for nuisance; "It would be at peril of builder;" Nares, J., in Parsons *v.* Loyd, 3 Wils. 346: "Every plaintiff sues out process at his peril." Martin, B., had already phrased the same idea in a little different form: (1856) Blyth *v.* Waterworks Co., 11 Exch. 781, during argument: "I held, in a case tried at Liverpool, in 1853, that if locomotives

at such a co-ordination of these kindred instances; for several such attempts, of more or less insight and conviction, may be found.[1] What gave the exposition on this occasion its novelty and its permanent success was the broad scope of the principle announced, the strength of conviction of its expounder, and the clearness of his exposition, and perhaps, too, the fact that the time was ripe for its acceptance.[2] It caught up and reconciled the absolute liabilities already predicated, as well in the two rules just above mentioned (consequential damage of an unlawful act, and "so use your own as not to injure another's") as in the remaining rules for trespasses by acts done "at peril" (keeping cattle, shooting guns under certain circumstances, and others already mentioned); it furnished a general category in which all such rules, whenever formed, could be placed. The full scope of the principle has since not always been perceived in individual instances; and Courts may differ, and have differed, as to whether particular acts (*e. g.* keeping reservoirs) should, in policy, have the principle applied to them.[3] But the practical effect of that great jurist's opinion has been to furnish

are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers; that they were liable for all the consequences," citing Lambert *v.* Bessey; and in Fletcher *v.* Rylands, 3 H. & C. 793 (lower Court), he speaks of "quasi-insurers."

[1] Holt, C. J., in Mason *v.* Keeling, 12 Mod. 332 (1700), and Tenant *v.* Goldwin, 2 Ld. Raym. 1089 (1705); Cockburn, C. J., in Vaughan *v.* Taff Vale R. Co., 5 H. & N. 679 (1850); and counsel in a few prior cases.

[2] Supplementing Lord Blackburn's judicial utterance, the theoretical exposition of Mr. Justice Holmes, in cc. III and IV of "The Common Law," has served more than anything else to commend and establish the distinction. It has been accepted also by Sir Frederick Pollock, in his "Torts," p. 17 (apparently), and by Mr. (now Justice) Wm. Schofield, formerly instructor in Torts in the Harvard Law School, in 1 Harv. Law Rev. 52.

[3] It is sometimes said, for instance, that Fletcher *v.* Rylands, is "not law" in America or in this or that State. But such statements fail to distinguish between (1) the acceptance of Lord Blackburn's principle above, and (2) its application to the specific facts in Fletcher *v.* Rylands. The principle is sanctioned, in one way or another, consciously or unconsciously, in every court of the country. But (a) it is not invariably held to control in cases having facts like Fletcher *v.* Rylands; and (b) the tendency may perhaps be said to be in many States to restrict to as few as possible the classes of situations to be governed by the principle. An example of the latter attitude is found in the masterly opinion of Mr. Justice Doe, in Brown *v.* Collins, 53 N. H. 442.

us with four main categories of voluntary acts from which may arise a question of Responsibility for a specific harm, viz. (1) acts done wilfully with reference to that harm; (2) acts done at peril with reference to that harm; (3) acts done negligently with reference to that harm; (4) acts done non-negligently with reference to that harm. In point of theory, the second and the fourth can best be regarded as subdivisions of the third.[1] But at any rate all four are nowadays kept separate by rules of law. We had, at the times of the Conquest, two categories only, — acts wilful and acts of misadventure, — and these scarcely distinguishable civilly. To-day, with the process of rationalization nearly accomplished, we find these transmuted to four, — a differentiation which is in scope and conscious significance novel to the past.

III

7. *Harm Done by Servants and other Agents:* 1300-1850. It remains to trace the test of master's responsibility for the tortious acts of persons in his service. In the first part of this Essay we found that in the primitive Germanic idea the master was to be held liable absolutely for harm done by his slaves or servants; that, in later Germanic times, the master could exonerate himself by surrendering the offending person, and at the same time taking an exculpatory oath, "se in hoc non conscium esse," "quod pura sit conscientia sua;" that, on English soil, in the early Anglo-Norman period this idea of responsibility appeared in the shape of exoneration for deeds of the servant not commanded or consented to; but that in that period the test of Command or Consent had hardly begun to be applied to responsibility in what we now term its civil aspect,[2] and, while common in penal matters, was by no means fixed in its scope. The subsequent development of the idea we may now take up in three stages: A. the period beginning with Edward I's time, 1300 *circa;* B. the period

[1] See the writer's articles on the theory of Torts, in VIII Harvard Law Review 200, 377.

[2] We find as late as Finch's Law (1654; ed. 1759, p. 198) the statement, "trespass is a criminal offence punishable by a fine unto the king;" and it is perhaps unsafe to draw any fixed distinction of "civil" and "criminal" in the present connection till the seventeenth century.

beginning with Lord Holt's time, 1700 *circa*; C. the period beginning with Lord Kenyon's time, 1800 *circa*. Speaking provisionally and roughly, these stages stand for the following phases: (1) the extension of the Command or Consent test to civil responsibility; (2) the test of Implied Command from General Authority; (3) the test of Scope of Authority or Course of Employment. We may now take up the evidence of this development.

A. *A. D. 1300-1700.* It will be apparent to one who studies the following cases that for a century or so the undercurrent of feeling was still that the master bore absolute civil responsibility for his servant's doings; that the extension of the Command test had to make its way against what may be called the presumption to the contrary, and that it came first in cases (such as fraud) more nearly related to the sort of conduct to which it was already recognized to apply, *i. e.* morally reprehensible, criminal acts; and that it can hardly be found to be accepted as a general rule in trespass, etc., until early in the sixteenth century:

1302, *Y. B.* 30-31 *Ed. I,* 532 (Rolls ed.). — Hugo is charged with rape. *Duodecim:* "Nos dicimus quod ipsa rapiebatur vi per homines domini Hugonis." *Justiciarius:* "Fuitne Hugo consentiens ad factum vel non?" *Duodecim:* "Non." . . . *Justiciarius:* "Hugo, quia ipsi vos acquietant, nos vos acquietamus."

1302, *Y. B.* 30-31 *Ed. I,* 203 (Rolls ed.). — A poor woman complained of frequent distresses by B. The inquest "said that the woman's son, who was of her mainpast [household], had done damage in B.'s wood." Berrewik, J.: "And inasmuch as he did wrong to distrain the woman for [the deed of] her mainpast," B. was found guilty.

1305, 33 *Ed. I,* 474 (Rolls ed.). — Writ of covenant by Henry de Bray, a tenant against his landlord, a knight, for disseisin. The inquest founded that the knight's lady had come with her friends, and the plaintiff, departing in fear, left her in possession "without that Master Henry was ousted by the knight himself or his counsel." The Court held that, "inasmuch as the deed of the wife is the deed of the husband, it is awarded that Master Henry recover these damages of 100 marks."[1]

[1] For the husband's responsibility for his wife in the borough courts, see Bateson's Borough Customs, I, pp. 223, 224, II, Introd. pp. 111-114 (Selden Soc. Pub. vols. XVIII, 1904, and XXI, 1906).

1353, *St.* 27 *Ed. III*, 2, *c.* 19. — "No merchant nor other, of what condition that he be, shall lose or forfeit his goods nor merchandizes for the trespass and forfeiture of his servant, unless he do it by the command or procurement of his master, or that he hath offended in the office in which his master hath set him, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used." (Apparently this is the first positive modification in civil matters. Here, as often elsewhere, mercantile convenience is earliest in calling for new adjustments.)

1401, *Beaulieu* v. *Finglam*, Y. B. 2 H. IV, 18, pl. 6. — Action for damage caused by the defendant's fire. Markham, J.: "A man is held to answer for the act of his servant or of his guest in such a case; for if my servant or my guest puts a candle on a beam, and the candle falls in the straw and burns all my house, and the house of my neighbor also, in this case I shall answer to my neighbor for the damage which he has, *quod concedebatur* per curiam." Hull, for the defendant: "That will be against all reason to put blame or default in a man where there is none in him; for negligence of his servants cannot be called his feasance." Then the traditional misfortune-liability is cited in reply. Then Markham, J.: "I shall answer to my neighbor for him who enters my house by my leave or my knowledge, or is entertained by me or by my servant, if he does, or any one of them does, such a thing . . . ; but if a man from outside my house, against my will, puts the fire . . . for that I shall not be held to answer to them, etc., for this cannot be said to be through ill-doing on my part, but against my will." [1]

1498, Y. B. 13 *H. VII*, 15, *pl.* 10. — "It was held in Common Bench, if my servant, against my desire, chases my beasts into the land of a stranger, I shall not be punished for this, but my servant; otherwise if my beasts escape against my desire, for I shall there be punished. *Quaere*, if I keep a dog, and my servant against my desire incites and causes the dog to bite and kill the beasts of a stranger, whether I shall be punished for this."

1505, Y. B. 20 *H. VII*, 13, *pl.* 23. — Trespass for false imprisonment; justification as bailiff by command of the sheriff under a writ; the sheriff had neglected to return the writ, and this was objected to as defeating the plea. Rede, C. J., "to the contrary. For there is no default in the bailiff. . . . For suppose that the master commands the servant to distrain, and so he does it and takes [the distress] to his master, and the master misuses it, is it reason to punish the servant? No, surely; and so no more here. And if the master commands the servant to distrain, and the servant does so, it is not reason, if the servant

[1] For this period, compare also the practice in borough courts (Bateson's Borough Customs, II, Introd. pp. 40-42).

misuses the distress, that the master should be punished by cause of his command, which was lawful in the beginning; wherefore, on the other hand, [in this case also] the law should be all one."

1506, Y. B. 21 *H. VII, 22, pl.* 21. — Same facts as in 20 H. VII, *supra;* probably the same case adjourned. Rede, C. J., holding the defendant excused "since every bailiff and every servant is bound to do the precept of his master in all that is legal," and showing that "there is a defendant in his master, in whom the default is," says: "As if I command my servant to take a distress for my rent, and he does it and leads the distress to me, and I kill it, or do other illegal thing with it, in this case the servant is excused; and, on the other hand, where I command my servant to take the distress legally, and he rides on the distress, in this case he shall be punished, and I excused, for that when I command him to do a thing legally, and he does contrary to the commandment, he does a wrong to which I did not assent [agrea]; it is reason to punish him and to excuse me, and so here. . . ."

1518, *Doctor and Student,* II., *c.* 42 (Muchall's ed. 233). — "For trespass or battery, or wrongful entry into lands or tenements, ne yet for felony or murther, the master shall not be charged for his servant, unless he did it by his commandment."

1525 *circa, Treatise on Subpoena* (1 Hargreave's Law Tracts, 347): "Also if a man's servant thro' negligence of his maister, tho' it be not by his commandmente or assente, but for lacke of correction, do offences and trespasse to his neighbour, whereby the master is bound in conscience to make restitution if his servante be not able, yet there lieth no subpœna againste the master to compel him to it."

1606, *Waltham* v. *Mulgar,* Moore, 776. — Action against the owner of a privateer which captured a friendly ship. A civilian solicitor argued for an absolute responsibility of masters "in public affairs." "He who has put a ship in traffic should provide servants who will not commit public offences." But Popham, C. J., said: "Where the master put his servant to do an illegal act, the master shall answer for the servant if he mistakes in the doing of the act; but where he put his servant to do a legal act, as here to take the goods of the king's enemies, and he has taken the goods of friends, the master shall not answer. As if one sent his servant to a market to buy or sell, and he robs or kills by the way, the master shall not answer; but if he sets him to beat some one, and he kills him or mistakes the person and beats another, the master is a murderer. So with rescous or trespass."

1677, *Michael* v. *Alestree.* — Action for bringing ungovernable horses to be trained in Lincoln's Inn Fields, whereby the plaintiff was injured; the horses were actually taken there by a servant of the defendant. The chief discussion was as to the

general liability for so using horses. It is then said, in 2 Lev. 172: "It shall be intended that the master sent the servant to train the horses there;" in 3 Keb. 650, "The master is as liable as the servant if he gave order for it."

1685, *Kingston* v. *Booth*, Skinner, 228. In an action of trespass for assault, battery, and wounding, "these points were ruled by three of the justices. . . . Secondly, If I command my servant to do what is lawful, and he misbehave himself, or do more, I shall not answer for my servant, but my servant for himself, for that it was his own act; otherwise it was in the power of every servant to subject his master to what actions or penalties he pleased. Thirdly, If I command my servant to do a lawful act, as in this case to pull down a little wooden house (wherein the plaintiff was . . .) and bid them take care they hurt not the plaintiff, if in this doing my servants wound the plaintiff, in trespass of assault and wounding brought against me, I may plead not guilty, and give this in evidence, for that I was not guilty of the wounding, and the pulling down the house was a lawful act." [1]

In view of the almost uniform language of Courts, counsel, and text-writers in these records of the 1500s and 1600s, it seems necessary to believe that the test, as it came to be accepted in those centuries, was none other than that of Command (*i. e.* before the deed) or Consent (Assent) (*i. e.* before or after the deed). In one specific case it is fairly clear that (for reasons already seen [2]) the old strict liability continued down through the 1600s, viz., the case of a fire started by the servant within the house. But apart from this exceptional case, and possibly one or two others involving the persistence of extraneous traditions, it may be inferred that the Command or Consent test was the natural and universal one. Moreover, it accords perfectly with the notions which we have found to characterize the later Germanic and the early Anglo-Norman periods, being the natural form of their orderly development.

Harmonizing with and corroborating the general rule, are

[1] The following intervening cases are corroborative: 1306, Y. B. 34 Ed. I, 252 (Rolls ed.); 1410, 11 H. IV, 91, 47; 1431, Y. B. 9 H. VI, 53, 37; 1443, Y. B. 21 H. VI, 39, 6; 1469, 8 Ed. IV, 17, 24; 1471, 10 Ed. IV, 18, 22; 1472, 11 Ed. IV, 6, 10; 1497, Keilwey, 3 *b;* 1618, Southern *v.* How, 2 Rolle's Rep. 5, 26, Poph. 143; 1625, Shelley *v.* Burr, 1 Rolle's Abr. 2, pl. 7; 1630, Bacon, Maxims, XVI; 1641, Noy, Maxims, c. 44; 1668, Cremer *v.* Humberton, 2 Keb. 352.

[2] *Ante,* p. 511.

two subsidiary rules, worth noting by way of evidence: (*a*) The rule that the command of the master excused the servant. It does not necessarily follow, of course, that where the servant had no command to plead in excuse, there the master would *not* be liable (though, as above indicated, that was in fact the rule); but the cases on pleading a command as an excuse are useful in indicating how common and natural that test was, and in thus corroborating the applicability of the corresponding test in suits against the master.[1] (*b*) The rule of pleading that the replication in denial *de injuria sua propria*, when made in answer to a plea of justification as servant under the command of a master, was proper only where the justification consisted in a command merely, without any claim of interest in property (Crogate's Case).[2] That a master's command, as above in (*a*), was generally a sufficient excuse is clearly implied in this rule, and we have here a corroborative effect of the same sort.

In the cases in the 1500s and 1600s there further appears the refinement which may be termed the doctrine of Particular Command, *i. e.* the doctrine that the master, to be liable, must have commanded the very act in which the wrong consisted (unless the command had been to do a thing in itself unlawful).[3] It was somewhat by way of a reaction against this refinement that the form of the rule began to change under Lord Holt; and to this next stage we now come.

B. *A. D. 1700-1800.* We may here pause for a moment to consider the situation at that time. It is obvious that the Particular Command doctrine, if pushed to its logical extreme (as it was apparently coming to be), must have resulted in putting very narrow limits on the principle of responsibility for servants' and agents' doings. The doctrine would re-

[1] Among the cases in point may be noted (1441) 19 H. VI, 50 pl. 7; (1463) 2 Ed. IV, 5, pl. 10; (1481) 21 Edw. IV, 5 pl. 10; (1678) Mires *v.* Solebay, 2 Mod. 244. This notion began to be repudiated in (1694) Sands *v.* Childs, 2 Lev. 351, and (1701) per Lord Holt, in Lane *v.* Cotton, 12 Mod. 472, 488.

[2] 8 Rep. 66 (1608).

[3] Notably in Southern *v.* How, Cremer *v.* Humberton, Kingston *v.* Booth, also in Noy and Doctor and Student, all pointing back to the idea in the 9 H. VI. case.

quire, in effect, that the master should be liable (unlawful errands apart) only when the deed in all its details had been expressly and specifically commanded; and the arguments in Southern *v.* How,[1] suggest the practical consequences of such a rule. Now, whether or not such a limited rule would have been desirable, it is certain that the circumstances of the time forced upon the judges a serious consideration of the expediencies of such a rule. The nation was reaping in commercial fields the harvest of prosperity sown in the Elizabethan age and destined to show fullest fruition in the age of Anne. The conditions of industry and commerce were growing so complicated, and the original undertaker and employer might now be so far separated from the immediate doer, that the decision of questions of masters' liability must radically affect the conduct of business affairs in a way now for the first time particularly appreciated. A time had come when persons administering the affairs of others could no longer be classed indiscriminately as "servants," at the beck and call of the master for each bit of work, — a time when in social development the position of a factor or agent vested with more or less authority and discretion was in fact no longer that of a servant.[2] It was therefore natural that the

[1] Cited *supra*, note 1, p. 524.

[2] Mr. Justice Holmes has shown (Harvard Law Review, IV, 361, V, 6, "Agency") how the early law knows only "servants," and how the "agent" is a later branching off from this class. The same thing has been additionally shown by Mr. C. C. Allen, in the American Law Review (XXVIII, 18). According to Murray's Dictionary, "agent" first appears in the commercial sense in Marlowe and Shakespeare. It may fairly be claimed that Shakespeare has in mind the rule of his day (applying it, to be sure, to a case of moral, not legal, responsibility) when he introduces the following colloquy: —

King Henry the Fifth, IV, 1: (One of the soldiers has been expressing forebodings as to the fatal outcome of the morrow's battle) *Williams:* " . . . Now if these men do not die well, it will be a black matter for the king that led them to it. . . ." *King Henry* (in disguise): "So, if a son that is by his father sent about merchandise do sinfully miscarry upon the sea, the imputation of his wickedness, by your rule, should be imposed upon the father that sent him; or if a servant, under his master's command transporting a sum of money, be assailed by robbers, and die in many irreconciled iniquities [that is, meet sudden death without a chance to get absolution for past sins], you may call the business of the master the author of the servant's damnation. But this is not so; the king is not bound to answer the particular endings of his soldiers, the father of his son, nor the master of his servant; for they purpose not their death when they purpose

judges should find themselves forced to consider (1) the practical expediency of the traditional test of liability, (2) if they should revise it, the expression and presentation of the test as revised.

On the first point, it is clear that they did in effect revise it. They determined (whether rightly or wrongly need not be here considered) that practical expediency could not put up with the logical consequences of the Particular Command test.[1]

As to the second point, the new phrasing, there was much uncertainty for a time, indeed for a century or more; but naturally enough the existing test was laid hold of and modified to suit their needs; and after all it was in itself fairly adapted to answer for the test which they thought just.[2] The test now became what may be termed the rule of Implied Command from a General Command or Authority. At the same time, amid the general reconsideration, other phrasings of the test were sometimes vouchsafed. "Whoever employs

their services." This is fairly an application of the doctrine of Particular Command.

It seems that the laws of Massachusetts Colony indicate a state of society in which the masters were still looked to for servants' torts, even where not commanded, — Brunner's thesis being illustrated, that the liability follows and depends on the power of control and correction: 1646, Laws and Liberties of Mass., 1660; Tit. "Burglary & Theft" (Whitmore's ed. 127): "[Penalty imposed for robbing orchards and gardens:] And if they be children or servants that shall trespass herein, if their parents or masters will not pay the penalty before exprest, they [the servants] shall bee openly whipped," re-enacted in General Laws of 1672, s. v. 1678, Law of Mass. Co.'s Council, Mar. 28, 1678 (Whitmore's Colonial Laws, 349): A penalty for shooting off a gun near any house or highway, and the offender to make full satisfaction to injured persons; "And where either they be servants or youths under their parents or masters, and shall not be able to make such satisfaction, such parents or masters shall be liable to make full and due satisfaction in all respects."

[1] Lord Holt's judgments markedly show this point of view; but the following passage of Lord Hardwicke's (Boucher *v.* Lawson, (1734) *infra*) is perhaps the most pointed brief one: "This case seemed at the trial of very great consequence, as it concerns on the one side . . . the security that persons have in trusting their gold, . . . and on the other side, as it concerned the security of owners of ships that they might not be charged by the default of their masters further than reason requires."

[2] Not that they fully appreciated the historical perspective and the significance of the situation; but one may gather from all said and done the meaning of events. We are dealing, not merely with the progress of a rule, but also with the development of an idea.

another is answerable;" "acting in the execution of authority;" "acting for the master's benefit;" "being about the master's business," — these appear as tentative expressions in the general effort to re-state on a rational basis. But the old test, in its broader scope, is still dominant in the last half of the new century:

1691, *Boson* v. *Sandford,* 2 Salk. 440; 3 Mod. 321. — The question was whether the owners of a ship were responsible for goods received by the master and spoiled by his negligence. Holt, C. J.: "The owners are liable in respect of the freight and as employing the master; for whoever employs another is answerable for him, and undertakes for his care to all that make use of him."

1698, *Tuberville* v. *Stamp;* action for a fire started by the defendant's servant in a field. Skinner, 681: It was argued by the defence that "it does not appear in this case to be done by the command of the master, and then it being out of his house he is not responsible." Comb. 459. Holt, C. J.: "And though I am not bound by the act of a stranger in any case, yet if my servant doth anything prejudicial to another, it shall bind me, where it may be presumed that he acts by my authority, being about my business." 1 Ld. Raym. 264: Holt, C. J.: "So, in this case, if the defendant's servant kindled the fire in the way of husbandry, and proper for his employment, though he had no express command of his master, yet the master shall be liable . . . ; for it shall be intended that the servant had authority from his master, it being for his master's benefit."

1699, *Middleton* v. *Fowler,* 1 Salk. 282. — Case against owners of a stage-coach for a trunk taken on by the driver, but lost. Holt, C. J., said that a stage-coachman was not here within the custom of carriers, and adds, as to the receipt of money by the driver, "no master is chargeable with the acts of his servant, but when he acts in execution of the authority given by his master, and then the act of the servant is the act of the master."

1709 (?), *Hern* v. *Nichols,* 1 Salk. 289. — Deceit for cloth of wrong quality; the deceit was in defendant's factor beyond sea. "Holt, C. J. was of opinion that the merchant was answerable for the deceit of his factor, though not *criminaliter,* yet *civiliter;* for seeing somebody must be a loser by the deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." [1]

1722, *Armory* v. *Delamirie,* 1 Stra. 505. — Where an appren-

[1] Here may be noted (1699) Jones *v.* Hart, 2 Salk. 441; (1704) Ward *v.* Evans, 2 Salk. 442; Wayland's Case, 3 Salk. 234. In Lane *v.* Cotton, (1701) 1 Salk. 17, 12 Mod. 477, where the postmaster was sued

tice converted a jewel handed to him for weighing, "the action well lay against the master, who gives a credit to his apprentice and is answerable for his neglect." (Pratt, C. J.)[1]

1734-6, *Boucher* v. *Lawson*, Lee's Hardwicke, 85, 194. — A ship-master took on gold at Portugal, contrary to Portuguese law, and on arrival in London it was missing. Counsel for defendant: "If the servant of a carrier carry goods without the privity of his master, or his receiving a reward for taking them, the master is not chargeable. . . . A master is not answerable for the acts of his servant but where he acts in execution of any authority given him by the master. . . . My servant sells false stuff without my commanding it; no action lies against me; otherwise if by my commandment." Counsel for plaintiff: "As to the master's not being liable for his servant but in the exercise of his trade, this is in the master's trade, for it is the trade of the owners of ships to carry goods;" citing Choke's case of the horseshoer in 11 Edw. IV, *ante*. Hardwicke, C. J., decides for the defendants: ". . . It deserves to be considered whether, if a ship be sent for a particular purpose, and not in the general way of trade, the master can take in goods to charge the owners. . . . For anything that appears in this case, this might be a ship sent to Lisbon for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owners liable. . . . This is no reason why these cases should be carried any further than they have been already."[2]

1758-65, *Blackstone, Commentaries*, I, 429. — "As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given or implied; *nam qui facit per alium facit per se*. Therefore, if the servant commit a trespass by the command or

for the loss of a package by a clerk, the case was argued on the effect of a statute and on the peculiar position of a public officer.

[1] Under similar circumstances the master was held responsible in Mead *v.* Hammond, 1 Stra. 505 (1722) by Pratt, C. J.; and in Grammar *v.* Nixon, 1 Stra. 653 (1726) by Eyre, C. J., the master was made responsible for a false warranty; no reasons being given in either case.

[2] In 1733 (Commons Journal, 277; Abbott on Shipping, 12 ed., Pt. IV., c. VII. vol. II, p. 339), in consequence of the claim made for the plaintiff in Boucher *v.* Lawson, a petition of merchants was presented to the House, setting forth the discouragement to commerce if owners were held liable for goods made away with by masters and mariners "without the knowledge or privity of the owner or owners," and a statute was passed (7 Geo. II. c. 15) exonerating them from being answerable for merchandise "made away with by the master or mariners without the privity of the owners" beyond the value of vessel and freight. This illustrates how the mercantile community noticed the broader scope of the revised rule as now substituted by the Courts for the traditional test of Particular Command (*i. e.* direct privity).

encouragement of his master, the master shall be guilty of it. If an inn-keeper's servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.* So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command. . . . In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. . . . A wife, a friend, a relation, that use to transact business for a man, are *quoad hoc* his servants; and the principal must answer for their conduct; for the law implies that they act under a general command; and without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. . . . [As to a servant's negligence], in these cases the damage must be done while he is actually employed in the master's service. . . . [In conclusion] the reason of this is still uniform and the same, — that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." [1]

Attention may here be called to —

1. The form and phrasing of the test. From the arguments in Boucher *v.* Lawson and the passages of Blackstone, it may easily be seen how the idea of Express Command was naturally enlarging itself into that of Implied Command, a Command to be implied or posited from a general commission to do a class of acts. "Whatever a servant is permitted to do in the usual course of his business," says Blackstone, "is equivalent to a general command." "Where he acts in execution of any authority," says counsel in Boucher *v.* Lawson; and this is the dominant phrase with Lord Holt. "It may be presumed that he acts by my authority, being about my business," is another phrase of his. The new terms are

[1] Compare here, also, (1773) Barker *v.* Braham, 3 Wils. 368; an action allowed against client and attorney for an arrest made by an error of the latter; De Grey, C. J.: "They say, whoever procures, commands, assists, assents, etc., is a trespasser; here the client commands the attorney, the attorney actually commands the sheriff's officer; the real commander is the attorney, the nominal commander is the plaintiff in the action. . . ."

natural enough and hardly call for explanation. It may be suggested, however, that "authority" was particularly easy of adoption because about this time it seems to have had, as a primary sense, the concrete meaning of a specific order (not merely the power itself, abstractly regarded).[1] As the full meaning of the situation was realized, it was inevitable that the broader terms "scope of authority," "exercise of trade," "course of employment," should prevail; but this was not yet to be.[2]

2. The reasons offered for the rule. As already observed, we find first under Lord Holt an effort to put the rule on a rational footing of policy,[3] — an effort which, owing to inherent difficulties, has not yet by any means ceased. Usually some definite ground of policy, more or less tenable, was offered. Lord Holt's reasons are in substance covered by his brief sentence in Wayland's Case, "It is more reasonable that he should suffer for the cheats of his servant than strangers and tradesmen," because it is he (Hern *v.* Nichols) who "puts a trust and confidence in the deceiver," and (Armory *v.* Delamirie, per Pratt, C. J.) "gives a credit" to him. Blackstone, tracing the harm back to the original command of the master, says "no man shall be allowed to make

[1] Cf. Brandon *v.* Peacock, Lee's Hardwicke, 86 (1730): "A person put tobacco on a ship, the master run away with the ship and tobacco, the goods being insured, the person that owned the tobacco applied to the insurance office and received the value of it. The insurance office took *an authority* from him to sue the owner, and the C. J. held that the action lay."

[2] One might fancy that the phrase of the St. 27 Ed. III (*ante*, p. 0) "offended in the office in which his master hath set him," supplies an antecedent for these phrases. But it would seem that "office" was purely a civil or canon (not Roman) law phrase. In Doctor and Student (II. c. 42) the civilian, asking for the English law, gives as a part of his own test, "when the household offendeth in any office or ministry that the master is the chief officer of;" and the writer has not found the phrase elsewhere than in that book and in the above statute. In the latter it may easily have been inserted by some clerical secretary learned in the canon law.

A test once ventured in 1698 (Tuberville *v.* Stamp, as in 1 Ld. Raym. 264) was that the act should be "for the master's benefit;" and in the 1800s this phrase played some part, though generally in subordination to and supplementary to the "scope of employment" test (Bush *v.* Steinman, *infra;* and *passim*).

[3] *E. g.* in Beaulieu *v.* Finglam (1401), *ante*, note 0, the Court harshly refuses to argue the question of expediency.

any advantage of his own wrong." Lord Hardwicke (Boucher *v.* Lawson) tries to strike a fair balance between the "security" which others ought to have who trust the servant and the "security" which masters ought to have from wayward employees. But very often the judicial mind gave up the troublesome task of accurately expressing a reason, and, quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. "The master undertakes for the servant's care," said Lord Holt, in Boson *v.* Sandford; which of course is not true. The favorite expressions of this sort, however, were "the act of the servant is the act of the master," when done in execution of authority (Middleton *v.* Fowler, Jones *v.* Hart), and "*qui facit per alium facit per se*" (Blackstone); and perhaps "*respondeat superior*" has often been used thus to evade giving a clear reason. Now here it must be noticed that there are different ways of employing a fiction. One is to accept as a guide a traditional element, though it no longer answers to the notions of the day, and to insist upon its use; as when the loss and finding are alleged in trover, or the loss of service in seduction. In the former instance the allegation is now recognized as a pure and ineffectual fiction; in the latter, except in some states, the loss of service must still be proved, though the whole basis of the claim rests to-day on other notions. A very different way is to employ a fiction to sanction a rule which we thoroughly believe in, but lazily prefer to evade accounting for openly and rationally. Of this sort is the instance in hand. Sometimes, as where in a document under seal the seal is said to presume a consideration, we borrow some kindred doctrine and force it to our present use; but sometimes, as here, we put forth a phrase not already used for the purpose, but now found very handy. So that what we have to remember about the employment of the above fiction of Identification, in the history of the present doctrine, is, (1) that it was merely a reason, an easy, concise reason, which was put forth to sanction and support a rule of whose practical expediency the Courts were perfectly satisfied; (2) that it was merely one of several reasons, and by no means the most common, and that, in short, the rule

would have stood substantially as it does now, if all reference to the Identification fiction were wanting.[1]

C. *A. D. 1800+*. In what may be taken as the next stage, the balance is seen to change gradually; the Command phrase disappears as a regular one, and the Scope of Employment phrase, with its congeners, come into full control. The opinions of Lord Kenyon seem chiefly to mark the change (though his language is not uniform). Savignac *v.* Roome and Stone *v.* Cartwright show the rivalry with particular clearness:

1795, *Morley* v. *Gaisford*, 2 H. Bl. 442. — Case against one whose servant negligently drove a cart against the plaintiff's chaise. A verdict was found for the plaintiff, but a motion was made in arrest of judgment that the action should have been trespass. "The Court seemed at first inclined to refuse the rule, saying that it was difficult to put a case where the master could be considered a trespasser for an act of his servant, which was not done at his command," but, after delaying for further consideration, the rule was discharged on the defendant's suggestion.[2]

1795, *Savignac* v. *Roome*, 6 T. R. 125. — Case for wilfully driving, by his servant, a coach against the plaintiff's chaise.

[1] Mr. Justice Holmes (Harvard L. Rev. IV, 345-364, V, 1-23, reprinted in this Collection as Essay No. 63) has expressed the belief that the identification fiction plays a leading part in earlier history; but the learned author has apparently been able to find before 1700 only five or six instances, not all unambiguous. The plain one from West's Symboleography clearly owes its origin to the civil law (as does a great deal throughout the book). West's "by some bond he is fained to be all one person," is the borrowing of a notion well known across the water: "Eadem est persona domini et procuratoris. Eadem, inquam, non rei veritate, sed fictione," etc. (Digesta, 44, 2, 4, note to Elzevir ed.). Very different are the indigenous English expressions, — scarcely fictions, but merely statements of legal results; *e. g.* "the driving of the servant is the driving of the master" (Smith *v.* Shepherd). Coke says of disseisin (Co. Litt., sects. 430-435): "Where the servant doth all that which he is commanded, . . . there it is as sufficient as if his master did it himselfe, for the rule is, *qui facit*, etc." This "as if" (and Littleton says the same) shows that there is here no fiction in a proper sense, — merely a concise statement of the legal result. The out-and-out identification expressions do not come into much vogue until after Blackstone's time.

[2] The argument for the defendant in Brucker *v.* Fromont, 6 T. R. 659 (1796), shows that this misconception of the earlier form of the rule was already in the air. Note that this, the first judicial misunderstanding of it (which became the basis of a special doctrine noticed later on), was in the Common Pleas, and that the King's Bench, Lord Kenyon's Court, did not exhibit it until well on in the next century.

Verdict for the plaintiff. Espinasse moved in arrest, because, first, "no action could be maintained against the defendant for a wilful act of the servant, accompanied with force, unless done by command of the master," citing Jones *v.* Hart, *supra;* and, second, because the action should have been trespass. Bayley contended that it was enough if the injury was done in the course of employment; but Espinasse quoted Blackstone, *ubi supra,* and Kingston *v.* Booth, *supra.* The Court made the rule absolute on the second ground, without noticing the first.

1796, *Stone* v. *Cartwright,* 6 T. R. 411. — The defendant managed a colliery as guardian; he employed a superintendent for the work, but took no personal concern in it. He was held not liable for a caving of the soil resulting from the improper removal of pillars. Lord Kenyon stated that such actions should be brought against either "the hand committing the injury, or against the owner for whom the act was done." Lawrence, J., said: "If the plaintiffs had given evidence that the defendant had particularly ordered those acts to be done from whence the damage had ensued, that would have varied the case."

1811, *Paley on Agency:* "But the responsibility of the master for the servant's negligent or unlawful acts is limited to cases properly within the scope of his employment. . . . The responsibility of the principal is confined to acts done either under his express direction, or in his service *and therefore* under his constructive command. In all cases in which the frauds or injuries of servants have been held to affect their employers, it appears that the employment afforded the means of committing the injury. No wilful trespass of a servant, not arising out of the execution of his master's orders or employment, will make him responsible."

1826, *Laughter* v. *Pointer,* 5 B. & C. 547. — Here the defendant hired a coach from a stable, and the stable-keeper sent a driver with it, and a collision ensued, there is no traceable remnant of the literal form of the doctrine; all seemed ready to say, as Lord Kenyon did: "I admit the principle, that a man is answerable for the conduct of his servants in matters done by them in the exercise of the authority that he has given them."[1]

From this time the general test is phrased as "scope" or "course" of "employment,"[2] "scope of authority,"[3] or, in

[1] Intervening cases are: 1799, Bush *v.* Steinman, 1 B. & P. 404; 1800, Ellis *v.* Turner, 8 T. R. 531; 1800, McManus *v.* Crickett, 1 East 107; 1826, Gregory *v.* Piper, 9 B. & C. 591.

[2] Sleath *v.* Wilson, 9 C. & P. 607, 1839; Story on Agency, 1839; Smith on Master and Servant, 1852.

[3] Cornfoot *v.* Fowke, 6 M. & W. 358, 1840; Att'y-Gen. *v.* Siddon, 1 Tyrwh. 41, 1830; Coleman *v.* Riches, 16 C. B. 104, 1855.

later times, more carefully, "in furtherance of and within the scope of the business with which he was trusted."[1]

Did no direct traces remain at later times of the supplanted Command test? Or was its broader substitute left in sole possession of the field after Lord Kenyon's time?

1. A very few cases are to be found in which (the judges, perhaps, having been brought up under the earlier form of doctrine) a direct survival may be seen.[2]

2. By one of those misunderstandings not infrequent in our legal system, the language of the 1700s century became, in the 1800s, the basis of the rule that the form of the action against the master could be Trespass in that case alone where the specific act had been commanded by him.[3] But this rule began in a misconception, gradually evolved, of the earlier rules, as reflected in the later series of cases just examined. The stages were three: (1) Morley *v.* Gaisford (1795), in the Common Pleas, initiates the above rule; but a comparison of it with Savignac *v.* Roome (1795), and Brucker *v.* Fromont (1796), indicates the prevailing principle, as administered in the King's Bench, to have been that the form of action followed the intrinsic nature of the act; *i. e.* sue the master in Case where negligence of the servant is the basis of the claim, sue in Trespass for the servant's trespass. (2) In McManus *v.* Crickett (1800), Lord Kenyon held that the master is not liable *at all* for a wilful trepass of the servant, unless done at express command, because he thus practically exceeds his authority; for his trespasses not wilful, Case lies. Of this understanding are Paley[4] and Peake,[5] writing shortly

[1] Keating, J., in Bolingbroke *v.* Board, L. R. 9 C. P. at 577, 1874.

[2] 1828, Goodman *v.* Kennell, 1 Moore & P. 241; 1857, Patten *v.* Rea, 2 C. B. N. S. 606; 1867, Barwick *v.* Bank, L. R. 2 Exch. 259.

Most of the American cases came at a time when the text-books had made the "scope of employment" or "authority" phrase the familiar one; but a few are to be found using the old language; *e. g.* McCalla *v.* Wood, Pennington (N. J.) 86 (1806): "Upon principles of law, one person can never be made liable for the trespass of another. It is true, that if one command or authorize his servant to commit a trespass, he is answerable himself; but then it is the trespass of the master, according to the well-known maxim of the law, *qui facit per alium facit per se.*"

[3] 1859, Gordon *v.* Rolt, 4 Exch. 365; 1849, Sharrod *v.* R. Co., ibid. 581.

[4] Agency, cited *ante*.

[5] Nisi Prius, p. 294.

after. (3) Then forgetfulness ensued, the opinion at the bar altered, and in (1826) Gregory *v.* Piper and in (1849) Sharrod *v.* R. Co., it was said that the master is not liable in Trespass for his servant's trespasses (*i. e.* direct acts, wilful or not), unless expressly commanded. This doctrine may well be regarded as a necessary result of the common-law theory of Trespass; but it seems on the evidence that it originally crept in through a misconception of the language of the old Command test, then becoming obsolete.

A review of this history of the idea of the master's and principal's liability throws some light on the validity of the principle in point of policy. As an existing rule, it cannot be objected to as the mere fossil remnant of a fiction. A learned writer has however averred that "common-sense is opposed to the fundamental theory of agency." This is not the place to offer to do what no one has yet succeeded in doing, — to phrase the feeling of justice which every one has in the more or less extended responsibility for agents' torts. But it is worth while noting that the doctrine of to-day took shape under Lord Holt in a conscious effort to adjust the rule of law to the expediency of mercantile affairs. It is also worth noting that the Command or Authority principle may prove to be, theoretically as well as historically, the true support of the rule of responsibility for agents' torts. Perhaps the nearest approach to theoretic adequacy is that of Lord Brougham, in Duncan *v.* Findlater, 6 Cl. & F. 894, 910: "I am liable for what is done for me and under my orders by the man I employ, . . . and the *reason* that I am liable is this, that by employing him I *set the whole thing in motion*, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it." [1] In other words, (1) if I command A to do act *x*, I ought to be liable for the natural consequences peculiar to that act taken in itself; (2) the same follows if *x* is a class, series, or group of acts; (3) if A does the act in a careless or otherwise wrongful way, different from that in which I ex-

[1] Or this: "If, instead of driving the carriage with his own hands he employs a servant to drive it, the servant is but an instrument set in motion by the master" (Alderson, B., in Hutchinson *v.* R. Co., 5 Exch. 350).

pected him to do it, and not as I myself might have done it, my personal culpability is no longer clear; nevertheless, complete legal exoneration in such cases would be poor policy, for it would afford ample opportunity to shirk responsibility, merely by appointing substitutes; so that some medium must be found. If, then, I employ knowingly a careless servant, here at least I should be liable, just as for imprudently keeping a dog known to be ferocious. But even this may on practical grounds be too lenient a rule, for I may still find means of evading due responsibility under cover of that test. Public convenience then may demand that I should be liable up to a still further point, even though I select agents carefully; in other words, we may say that I employ a substitute more or less at my peril. Just as gunpowder is kept at peril, but steam-engines, through demands of industrial welfare, are not kept at peril, so there is an undefined point at which the appointment of a substitute ceases to be at peril; and in the nature of the case that point is in individual instances hard to determine. But the conflict is hardly, as the learned jurist would place it, between common-sense and tradition, but between one great consideration of policy and another. If the restraining consideration just now seems to be the weak one, it is precisely because, as the above-mentioned article admits, public opinion is convinced (rightly or wrongly) that the broad rule is a "seemingly wholesome check on the indifference and negligence of great corporations." Whether for the sake of this alone we should sanction such broad limits in dealing with the general mercantile community is perhaps a really different question. But at any rate the whole liability, wherever it be bounded, can be discussed and expressed, it would seem, "according to the ordinary canons of legal responsibility," without borrowing support from a supposed historic fiction.

PART VIII

PROPERTY (IN GENERAL)

67. Disseisin of Chattels.

JAMES BARR AMES

68. The Mystery of Seisin.

FREDERICK WILLIAM MAITLAND

69. History of the Action of Ejectment in England and the United States.

ARTHUR GEORGE SEDGWICK AND FREDERICK SCOTT WAIT

70. The Gage of Land in Mediæval England.

HAROLD DEXTER HAZELTINE

71. Changes in the English Law of Real Property during the Nineteenth Century.

ARTHUR UNDERHILL

[Other References on the Subject of this Part are as follows:

Folcland, by Paul Vinogradoff (English Historical Review, 1893, VIII, 1).

The Transfer of Land in Old English Law, by Paul Vinogradoff (Harvard Law Review, 1907, XX, 532-548).

Changes in the American Law of Real Property. Anon. (American Jurist, 1829, pp. 28-97).

Les fondations [charitable gifts] en Angleterre; étude de droit comparée, by Jean Escarra (Paris, 1907).

History of Land Tenure in Scotland and England, by R. Campbell (Law Quarterly Review, 1885-86, I, 175-183, 400-411, II, 166-176).

History of the Irish Land System, by W. O. Morris (Law Quarterly Review, 1887, III, 133-157).

Alienation of Estates Tail, by H. W. Elphinstone (Law Quarterly Review, 1890, VI, 280-288).

Short Studies in the Early Common Law; II, Rents-Charge, by W. G. Hammond (Green Bag, 1892, IV, 283-292).

Early English Land Tenures, by M. Kovalevsky (Law Quarterly Review, 1880, IV, 266-285).

The Seisin of Chattels, by F. W. Maitland (Law Quarterly Review, 1885, I, 324-341).

The Beatitude of Seisin, by F. W. Maitland (Law Quarterly Review, 1888, IV, 24-39, 286-299).

Possession for a Year and a Day, by F. W. Maitland (Law Quarterly Review, 1889, V, 253-264).

Feoffment and Livery of Incorporeal Hereditaments, by L. O. Pike (Law Quarterly Review, 1889, V, 29-43).

Origin of Rights of Common, by T. E. Scrutton (Law Quarterly Review, 1887, III, 373-398).

History of Legislation concerning Property in England, by J. E. R. de Villiers (London, 1901).

Changes of Real Property Law in the United States, by G. E. Beers (in Two Centuries of Growth of American Law, Yale Bi-Centenary Studies, New York, 1901).

Origin of the System of Recording Deeds in America, by J. H. Beale, Jr. (Green Bag, 1907, XIX, 335).]

67. THE DISSEISIN OF CHATTELS[1]

By James Barr Ames[2]

I

THE readers of "The Seisin of Chattels," by Professor Maitland, in the "Law Quarterly Review" for July, 1885, were doubtless startled at the outset by the title of that admirable article. But all must have admitted at the end that the title was aptly chosen. The abundant illustrations of the learned author show conclusively that from the days of Glanvil almost to the time of Littleton, "seisin" and "possession" were synonymous terms, and were applied alike to chattels and land. In a word, seisin was not a purely feudal notion.

Is it possible, however, to justify the title of the present article? Is it also a mistake to regard disseisin as a peculiarity of feudalism? History seems to answer these questions in the affirmative. The word "disseisin," it is true, was rarely used with reference to personalty. Only three illustrations of such use have been found,[3] as against the multitude of allusions to seisin of chattels noted by Professor Maitland. In substance, however, the law of disseisin was common to both realty and personalty.

A disseisor of land, it is well known, gains by his tort an estate in fee simple. "If a squatter wrongfully incloses a bit of waste land and builds a hut on it, and lives there, he acquires an estate in fee simple in the land which he has inclosed. He is seised, and the owner of the waste is disseised.

[1] This Essay was originally published in the Harvard Law Review, 1890, Vol. III, pp. 23-40, 313-328, 337-346. Additions are indicated by brackets.

[2] A biographical note of this author is prefixed to Essay No. 43, in Volume II of this Collection.

[3] 1 Rot. Cur. Reg. 451; 1 Stat. of Realm, 230, or Bract. f. 136 b; Y. B. 14 Edw. II. 400.

. . . He is not a mere tenant at will, nor for years, nor for life, nor in tail; but he has an estate in fee simple. He has seisin of the freehold to him and his heirs."[1] Compare with this the following, from Fitzherbert: "Note if one takes my goods, he is seised now of them as of his own goods, adjudged by the whole court;"[2] or Finch's definition: "Trespass in goods is the wrongful taking of them with pretence of title, and therefore altereth the propertie of those goods."[3] This altering of the property by a trespass is pointedly illustrated by a case from the "Book of Assizes."[4] The plaintiff brought a bill of trespass for carrying off his horse and killing it. "The defendant prayed judgment of the bill, since you have confessed the property to be in us at the time of the killing, and so your bill is repugnant; for by the tortious taking, the property was devested out of you and vested in us, and therefore we could not kill our own horse *contra pacem.*" The bill was adjudged bad. Furthermore, incredible as it may appear, a disseisin by theft vested the property in the stolen chattel in the thief. John *v.* Adam[5] was a case of replevin in the *detinet* for sheep. Avowry that the sheep were stolen from the plaintiff by M., who was driving them through the defendant's hundred; that M., to avoid arrest, fled to the church and abjured the realm, and so the defendant was seised by virtue of his franchise to have the goods of felons. Certain formal objections were taken to the avowry, to which Herle, C. J., answered: "Whatever his avowry be, you shall take nothing; for he has acknowledged that the property was once in you, and afterward in him who stole them; and now he affirms the property in

[1] Williams, Seisin, 7. See also Leach *v.* Jay, 9 Ch. Div. 42, 44, 45. [Two joint disseisors become joint tenants. Putney *v.* Dresser, 2 Met. 583; Litt. § 278.]

[2] Fitz. Ab. Tresp. 153.

[3] Finch, Law, Book III. c. 6.

[4] 27 Ass. pl. 64. See also Y. B. 2 H. IV. 12-51. There is a legal curiosity in 2 Roll. Ab. 553 [Q] 1, 2. "If my servant, without my knowledge, put my beasts in another's land, my servant is the trespasser and not I; because, by the voluntary putting of the animals there without my consent, he gains a special property for the time, and so for this purpose they are his animals. But, *semble,* if my wife puts my beasts in another's land, I, myself, am trespasser, because the wife cannot gain a property from me."

[5] Y. B. 8 Ed. III. 10-30.

himself, and therefore, although he cannot maintain the property in himself for the reason alleged, still you shall not have the sheep again, for he gives a mesne; namely, the felon in whom the property was." [1] The opinion of this distinguished judge is confirmed by numerous cases in which stolen goods were forfeited by the thief, under the rule of law that gave to the Crown the chattels of felons. The goods, having become by the theft the property of the felon, were forfeited as a matter of course with the rest of his chattels.

These examples are sufficient to bring out the analogy between the tortious taking of chattels and the wrongful ouster from land. But in order to appreciate fully the parallel between disseisin of chattels and dissesin of land, we must consider in some detail the position of the disseisor and disseisee in each case. [2]

The disseised owner of land loses, of course, with the *res* the power of present enjoyment. But this is not all. He retains, it is true, the right *in rem;* or, to use the common phrase, he has still a right of entry and a right of action. But by an inveterate rule of our law, a right of entry and a chose in action were strictly personal rights. Neither was assignable. It follows, then, that the disseisee cannot transfer the land. In other words, as long as the disseisin continues, the disseised owner is deprived of the two characteristic features of property, — he has neither the present enjoyment nor the power of alienation.

These conclusions are fully borne out by the authorities. "The common law was," as we read in Plowden, "that he who was out of possession might not bargain, grant, or let his right or title; and if he had done it, it should have been

[1] [C stole from B goods which B had stolen from A. An indictment against C describing the goods as the property of B was held good in Ward *v.* People, 3 Hill, 395.]

[2] Y. B. 30 & 31 Ed. I. 506, 512, 512-514, 526; Fitzh. Coron. 95, 162, 318, 319, 367, 379, 392; Fitzh. Avow. 151; Dickson's Case, Hetl. 64. Under certain circumstances the victim of the theft might obtain restitution of the goods. But the cases cited in this note show the difficulties that must be surmounted.

[3] For the best discussion of the doctrine of disseisin of land see Maitland "Mystery of Seisin," 2 L. Q. Rev. 481, to which the present writer is indebted for many valuable suggestions.

void." [1] It was not until 1845 that by statute [2] the interest of the disseisee of land became transferable. Similar statutes have been enacted in many of our States.[3] In a few jurisdictions the same results have been obtained by judicial legislation.[4] But in Alabama, Connecticut, Dakota, Florida, Georgia, Kentucky, Massachusetts, New York, North Carolina, Oklahoma, Rhode Island, and Tennessee, and presumably in Maryland and New Jersey, it is still the law that the grantee of a disseisee cannot maintain an action in his own name for the recovery of the land.[5]

A right of entry and action is now everywhere devisable. But until 1838 in England and 1836 in Massachusetts, a disseisee had nothing that he could dispose of by will.[6] . .

If we turn now from transfers by act of the party to transfers by operation of law, we find that in the one case of bankruptcy there was a true succession to the disseisee's right to enter or sue. But this was, of course, a statutory transfer.[7]

[1] Partridge *v.* Strange, Plow. 88, per Montague, C. J. [See also Doe *v.* Evans, 1 Q. B. 717, and 1 Platt, Leases, 50. Bract. f. 376, 5 Tw. Bract. 456; 7 Seld. Socy., Mirror of Justice, 74-75; Co. Litt. 266, a.]

[2] 8 & 9 Vict. c. 106, § 6. See Jenkins *v.* Jones, 9 Q. B. Div. 128.

[3] Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, Vermont, Virginia, West Virginia, Wisconsin, Arizona, Idaho, Utah, Wyoming.

[4] Delaware, District of Columbia, Maryland, New Hampshire, Ohio, Pennsylvania, South Carolina, Texas.

[5] Bernstein *v.* Humes (1877), 60 Ala. 582; Conn. Rev. Stat. (1875) 354, § 15; Dak. Civil C. § 681; Doe *v.* Roe (1869), 13 Fla. 602; Russell *v.* Doyle (1886), 84 Ky. 386, 388; Sohier *v.* Coffin (1869), 101 Mass. 179; Rawson *v.* Putnam (1880), 128 Mass. 552, 554; Webster *v.* Van Steenburgh (1864), 46 Barb. 211; Murray *v.* Blackledge (1874), 71 N. Ca. 492; Burdick *v.* Burdick (1884), 14 R. I. 574; Tenn. Code (1884), § 2446; [Probst. *v.* Bush, 115 Ala. 495; Levy *v.* Cox, 22 Fla. 546; Reyes *v.* Middleton, 36 Fla. 99; Smith *v.* Klay, 47 Fla. 216; Doe *v.* Edmondson (Fla. 1906) 40 So. R. 505; Davitte *v.* So. Co. 108 Ga. 665; Lowe *v.* Bivens, 112 Ga. 341; Gately *v.* Weldon, 12 Ky. L. Rep. 621; Sneed *v.* Hope, 16 Ky. L. Rep. 871; Terry *v.* Hilton, 20 Ky. L. Rep. 367; Preston *v.* Breckenridge, 86 Ky. 619 (*semble*); Joyce *v.* Dyer, 189 Mass. 64; Thomas *v.* Perry (New Jersey law), Pet. C. C. 49; Pearce *v.* Moore, 114 N. Y. 256; Dever *v.* Hagerty, 169 N. Y. 481; Gilmore *v.* Dolan, 114 N. Y. Ap. Div. 774; Green *v.* Horn, 128 N. Y. Ap. Div. 686; Huston *v.* Scott (Okla. 1908), 94 Pac. R. 512; Galbraith *v.* Payne, 12 N. Dak. 164; Schneller *v.* Plankinton, 12 N. Dak. 561; Randolp. *v.* Kinney, 3 Rand. 394, 396.]

[6] 1 Jarm. Wills (4 ed.), 49; Poor *v.* Robinson, 10 Mass. 131; Mass. Rev. St. c. 62, § 2. [Y. B. 39 Hen. VI, 18-23.]

[7] Smith *v.* Coffin, 2 H. Bl. 444.

There was also a succession *sub modo* in the case of death. The heir of the disseisee, so long as he continued the *persona* of the ancestor, stood in his place. But the succession to the right *in rem* was radically different from the inheritance of the *res* itself. If the heir inherited the land, he became the feudal owner of it, and therefore at his death it descended to his heir, unless otherwise disposed of by deed or will. On the other hand, if a right of entry or action came to the heir, he did not become the absolute owner of the right. He could not hold a chose in action as tenant in fee simple. The right was his only in his representative capacity. He might, of course, reduce the right in action to possession, and so become feudal owner of the land. But if he died without gaining possession, nothing passed to his heir as such. The latter must be also the heir of the disseisee, and so the new representative of his *persona*, in order to succeed to the right *in rem*.[1]

These two cases of death and bankruptcy were the only ones in which the disseisee's right was assignable by involuntary transfer. There was, for example, no escheat to the lord, if the disseised tenant died without heirs, or was convicted of felony. This doctrine would seem to have been strictly feudal. Only that could escheat which was capable of being held by a feudal tenure. A chose in action could not be held by such a tenure. Only the land itself could be so held. But the land, after the disseisin, was held by the disseisor. So long as his line survived, there was no "*defectus tenentis*." The death of the disseisee without heirs was, therefore, of no more interest to the lord than the death of any stranger.[2]

The lord was entitled to seize the land of his villein. But if the villein had been disseised before such seizure, the lord could not enter upon the land in the possession of the disseisor, except in the name of the villein, and, after a descent

[1] [Carr *v.* Anderson, 6 N. Y. Ap. Div. 6, 10.]

[2] This principle was not maintained in its full integrity in the time of Coke. See Maitland, 2 L. Q. Rev. 486, 487, where the authorities are fully collected. ["As if a man be disseised and after be outlawed, he shall not forfeit the profits of the land," Beverley's Case, Goldsb. 55, pl. 8.]

cast, could not enter at all.[1] Nor had he any right to bring an action in the name of his villein.[2]

It is still the law in most of our States, as it was in England before 1833,[3] that "if a man seised of land in fee be disseised of the same, and then take a wife and die without reentering, she shall not have dower."[4]

The husband of a woman who was disseised before the marriage may, of course, enter upon the disseisor in his wife's name, or he may bring an action to recover the land in their joint names; but if the land is not recovered in the one way or the other before his wife's death, he must suffer for his laches. For the old rule, which denied to the husband curtesy in his wife's right of entry or action, has not lost its force on either side of the ocean.[5] It was applied in New York, to the husband's detriment, as recently as 1888.[6]

One more phase of the non-assignability of the disseisee's right of action is shown by another recent case. It was decided in Rhode Island, in 1879, in accordance with a decision by the King's Bench, in the time of James I.,[7] that a disseised owner of land had nothing that could be taken on execution.[8]

The position of the disseisor of land is, in most respects, the direct opposite of that of the disseisee. The strength of each is the weakness of the other. The right of the disseisee to recover implies the liability of the disseisor, or his transferee, to lose the land. But so long as the disseisin continues,

[1] Co. Lit. 118 b.
[2] Co. Lit. 117 a.
[3] 3 & 4 Wm. IV. c. 105.
[4] Perk. § 366; Thompson *v.* Thompson, 1 Jones (N. Ca.), 431; 1 Washb. R. P. (5 ed.) 225, 226; [Y. B. 24 Ed. III. 65, a-69 per Shard; Carr *v.* Anderson, 6 N. Y. Ap. Div. 6].
[5] 2 L. Q. Rev. 486; 1 Bishop, Mar. W. § 509; Den *v.* Demarest, 1 Zab. 525, 542.
[6] Baker *v.* Oakwood, 49 Hun, 416.
[7] Stamere *v.* Amonye, 1 Roll. Abr. 888, pl. 5; [Gilb. Executions, 42; Doe *v.* Minthorne, 3 Up. Can. Q. B. 423 Accord].
[8] Campbell *v.* Point St. Works, 12 R. I. 452. McConnell *v.* Brown, 5 Mon. 478; [Farmers Bank *v.* Pryse, 25 Ky. L. Rep. 807] *Accord.* By statute or judicial legislation a different rule prevails in some jurisdictions. Doe *v.* Haskins, 15 Ala. 619; McGill *v.* Doe, 9 Ind. 306; Blanchard *v.* Taylor, 7 B. Mon. 645; Hanna *v.* Renfro, 32 Miss. 125, 130; Rogers *v.* Brown, 61 Mo. 187 (*semble*); Truax *v.* Thorn, 2 Barb. 156; Jarrett *v.* Tomlinson, 3 Watts & S. 114; Kelley *v.* Morgan, 3 Yerg. 437.

the disseisor, or his transferee, possesses all the rights incident to the ownership of an estate in fee simple. He has the *jus habendi* and the *jus disponendi*. If he is dispossessed by a stranger, he can recover possession by entry or action.[1] If he wishes to transfer his estate in whole or in part, he may freely do so. He may sell the land,[2] or devise it,[3] or lease it.[4] His interest is subject also to the rules of involuntary transfer. Accordingly, it may descend to his heir,[5] escheat to his lord,[6] or be taken on execution,[7] and would doubtless pass to his assignee in bankruptcy. The husband of the disseisor has curtesy,[8] and the wife dower;[9] and a disseisin by a villein must have enured to the benefit of his lord at the latter's election. [The disseisor may insure the land.[10] He may grant a rent charge out of it.[11] He has the right of common which his disseisee had.[12] He may convey the land upon trust.[13] He may transfer it to A for life with remainder to B, and the estate of A and B will be the same, as if the grantor had the absolute fee simple, as to every one except the disseisee, and as to him also after the Statute of Limitations has run.[14] If the disseisor creates chattels by severance from his fee simple, the title to these chattels is in him so fully that, so long as the disseisin continues, the disseisee cannot maintain trover, detinue or replevin against

[1] Bract. 165 a; Bateman *v.* Allen, Cro. Eliz. 437, 438; Asher *v.* Whitlock, L. R. 1 Q. B. 1.

[2] Christy *v.* Alford, 17 How. 601; Weber *v.* Anderson, 73 Ill. 439.

[3] Asher *v.* Whitlock, L. R. 1 Q. B. 1; Haynes *v.* Boardman, 119 Mass. 414.

[4] 1 Platt, Leases, 51.

[5] Watkins, Descents (4 ed.), 4, n. (c); Currier *v.* Gale, 9 All. 522. [Janes *v.* Holmden, (Kan. Ap.) 52 Pac. R. 913.]

[6] 2 L. Q. Rev. 487, 488.

[7] Sheetz *v.* Fitzwalter, 5 Barr, 126; Talbot *v.* Chamberlain, 3 Paige, 219; Murray *v.* Emmons, 19 N. H. 483; [Switzer *v.* Skiles, 8 Ill. 529, 532; Richards *v.* Jenkins, 18 Q. B. Div. 451].

[8] Colgan *v.* Pellew, 48 N. J. 27; 49 N. J. 694.

[9] Hale *v.* Munn, 4 Gray, 132; McEntire *v.* Brown, 28 Ind. 347; Randolph *v.* Doss, 4 Miss. 205; 1 Scribner, Dower, 255, 256, 353, 354.

[10] Travis *v.* Continental Co., 32 Mo. Ap. 198, 206.

[11] Anon. Dy. 5, a.

[12] Y. B. 19 Hen. VI. 32-66.

[13] Hawksbee *v.* Hawksbee, 11 Hare, 230.

[14] Anstee *v.* Nelms, 1 H. & N. 225, 232; Asher *v.* Whitlock, L. R. 1 Q. B. 1; Board *v.* Board, L. R. 9 Q. B. 48; Dalton *v.* Fitzgerald, [1897] 2 Ch. 86, [1897] 1 Ch. 446.

him.[1] Nor an action for money had and received for the proceeds of the sale of the chattels.[2] But these actions are given to the disseisor against the disseisee, if the latter carries off the severed chattels before regaining the seisin.] [3]

The legal effects of the disseisin of chattels are most vividly seen by looking at the remedies for a wrongful taking. The right of recaption was allowed only *flagrante delicto*. This meant in Britton's time the day of the taking. If the owner retook his goods afterwards, he forfeited them for his "usurpation." [4] If the taking was felonious,[5] the despoiled owner might bring an appeal of larceny, and, by

[1] McConnaughy *v.* Wiley, 33 Fed. 449; Halleck *v.* Mixer, 16 Cal. 574, 579; Page *v.* Fowler, 28 Cal. 605, 39 Cal. 412; Martin *v.* Thompson, 62 Cal. 618; Groom *v.* Alstead, 101 Cal. 425; Ophir Co. *v.* Superior Court, 147 Cal. 468, 477; Anderson *v.* Hapler, 34 Ill. 436; Nichols *v.* Dewey, 4 All. 386, 387; Lehigh Co. *v.* N. J. Co. 55 N. J. 350; De Mott *v.* Hagerman, 8 Cow. 220; Van Etten *v.* Caines, 3 Keyes, 329, 333; Stockwell *v.* Phelps, 34 N. Y. 363; Samson *v.* Rose, 65 N. Y. 411, 419, 431 (*semble*); Hinton *v.* Walston, 115 N. Ca. 7; Mather *v.* Trinity Church, 3 S. & R. 509; Brown *v.* Caldwell, 10 S. & R. 114; Powell *v.* Smith, 2 Watts, 126; Nat. Co. *v.* Weston, 121 Pa. 485; Griffin *v.* Pipe Lines, 172 Pa. 580; Churchill *v.* Ackerman, 22 Wash. 227; Clark *v.* Clyde, 25 Wash. 661. The rule is otherwise in Michigan. McKinnon *v.* Master, 104 Mich. 642.

[2] Bigelow *v.* Jones, 10 Pick. 161; Stockman *v.* Phelps, 34 N. Y. 363; Baker *v.* Howell, 6 S. & R. 476 (*semble*).

[3] Brothers *v.* Hurdle, 10 Ired. 490; Branch *v.* Morrison, 5 Jones, (N. Ca.) 16; 6 Jones, (N. Ca.) 16; Roy *v.* Gardner, 82 N. Ca. 454; Lehman *v.* Kellerman, 65 Pa. 489 (overruling Elliott *v.* Powell, 10 Watts, 453). If, however, the disseisee recovers the seisin of the land he may proceed against the disseisor for the chattels or their value, being treated, by the fiction of relation, as if he had held the seisin all the time. But as this fiction of relation is based upon justice it will not be created to the prejudice of one who has bought the severed chattels of the disseisor without notice of the disseisin. Page *v.* Fowler, 39 Cal. 412; Johnston *v.* Fish, 105 Cal. 420; Brothers *v.* Hurdle, 10 Ired. 490, 492; Faulcon *v.* Johnston, 102 N. Ca. 264; Pac. Co. *v.* Isaacs (Oreg. 1908) 96 Pac. R. 460; Reilly *v.* Crown Co. 213 Pa. 595.

[4] 1 Nich. Britt. 57, 116. The right of self-help in general was formerly greatly restricted. The disseisee's right of entry into land was tolled after five days. If he entered afterwards, the disseisor could recover the land from him by assize of novel disseisin. Maitland, 4 L. Q. Rev. 29, 35. So the writ of ravishment of ward would lie against one entitled to the ward if he took the infant by force from the wrongful possessor. Y. B. 21 & 22 Ed. I. 554. The lord must resort to his action to recover his serf, if not captured *infra tertium vel quartum diem*. 4 L. Q. Rev. 31. A nuisance could be abated by act of the party injured, only if he acted immediately. Bract. f. 233; 1 Nich. Br. 403.

[5] Originally any taking without right, like killing by accident, was felonious. In Bracton's time, if not earlier, the *animus furandi* was essential to a felony. Bract. f. 136 b.

complying with certain conditions,[1] obtain restitution of the stolen chattel. But such was the rigor and hazard of these conditions, that from the middle of the thirteenth century the appeal was largely superseded by the new action of trespass.[2] If the taking was not criminal, trespass was for generations the only remedy.[3]

Trespass, however, was a purely personal action; it sounded only in damages. The wrongful taking of chattels was, therefore, a more effectual disseisin than the ouster from land. The dispossessed owner of land, as we have seen, could always recover possession by an action. Though deprived of the *res*, he still had a right *in rem*. The disseisor acquired only a defeasible estate. One whose chattel had been taken from him, on the other hand, having no means of recovering it by action, not only lost the *res*, but had no right *in rem*. The disseisor gained by his tort both the possession and the right of possession; in a word, the absolute property in the chattel taken.

What became of the chattel afterwards, therefore, was no concern of the victim of the tort. Accordingly, one need not be surprised at the following charge given by Brian, C. J., and his companions to a jury in 1486: "If one takes my horse *vi et armis* and gives it to S, or S takes it with force and arms from him who took it from me, in this case S is not a trespasser to me, nor shall I have trespass against him for the horse, because the possession was out of me by

[1] See cases cited *supra*, p. 543, n. 2.

[2] A case of the year 1199 (2 Rot. Cur. Reg. 34) seems to be the earliest reported instance of an action of trespass in the royal courts. Only a few cases are recorded during the next fifty years. But about 1250 the action came suddenly into great popularity. In the *Abbreviatio Placitorum*, twenty-five cases are given of the single year 1252-1253. We may infer that the writ, which had before been granted as a special favor, became at that time a writ of course. In Britton (f. 49), pleaders are advised to sue in trespass rather than by appeal, in order to avoid "*la perilouse aventure de batayles.*" Trespass in the popular courts of the hundred and county was doubtless of far greater antiquity than the same action in the *Curia Regis*. Several cases of the reign of Henry I. are collected in Bigelow, Placita Anglo-Normannica, 89, 89, 98, 102, 127.

[3] In early English law, as in primitive law in general, the principle of parsimony did not permit concurrent remedies. The lines were drawn between the different actions with great sharpness. The right to sue a trespasser in replevin and detinue was a later development, as will be explained further on.

the first taking; then he was not a trespasser to me, and if the truth be so, find the defendant not guilty." [1] Brooke adds this gloss, "For the first offender has gained the property by the tort." [2]

The complete divestiture of the owner's property in a chattel by a disseisin explains also a distinction taken in the Year Books, which has proved a stumbling-block to commentators to the present day: "Note by Fineux, C. J., and Tremayle, C. J. If I bail goods to a man and he gives them to a stranger or sells them, if the stranger takes them without livery he is a trespasser, and I shall have a writ of trespass against him; for by the gift or sale the property was not changed but by the taking. But if he delivered them to the vendee or donee, then I shall not have trespass." [3] At this time, although anciently the rule was otherwise, the possession of the bailee at will was treated as the possession of the bailor also. In the first case, therefore, where there was no delivery by the bailee, the stranger by taking the goods disseised the bailor and so was liable to the latter in trespass. But in the other case, where the bailee delivered the goods sold, he was the disseisor. By a single act he gained the absolute property in the goods and transferred it to the vendee, who was thus as fully beyond the reach of the disseisee as the vendee of the disseising trespasser in the earlier case before Brian, C. J. The peculiarity in the case of the bailment lies in the form of the disseisin. But the asportation of a chattel or the ouster from land, although the commonest, were not the only modes of disseisin. Any physical dealing with the chattel under an assumption of dominion, or, to borrow a modern word, any conversion, was a disseisin. The wrongful delivery of the goods by the bailee as vendor corresponds perfectly to a tortious feoffment by a termor. Such a feoffment was a disseisin of the landlord;

[1] Y. B. 21 Ed. IV. 74-6. See to the same effect Bro. Ab. Ej. Cust. 8, and Tresp. 256; Y. B. 2 Ed. IV. 5-9, *per* Needham, J.; Y. B. 4 H. VII. 5-1; Y. B. 16 H. VII. 3, a-7; Staunf. Pl. Cor. 61, a; Harris *v.* Blackhole, Brownl. 26; [Day *v.* Austin, Ow. 70; Walgrave *v.* Skinner, Ow. 120].

[2] Bro. Ab. Tresp. 358.

[3] Y. B. 21 H. VII. 39-49. See also Y. B. 2 Ed. IV. 5-9. 2 Wms. Saund. 47 c; Wright & Pollock, Possession, 169.

and the feoffor, not the feoffee, was the disseisor.[1] The act of feoffment was at once an acquisition of a tortious fee and a conveyance.[2]

To-day, as every one knows, neither a trespasser, nor one taking or buying from him, nor the vendee of a bailee, either with or without delivery by the latter, acquires the absolute property in the chattel taken or bailed. The disseisee of goods, as well as the disseisee of land, has a right *in rem*. The process by which the right *in personam* has been transformed into a real right may be traced in the expansion of the writs of replevin and detinue, and is sufficiently curious to warrant a slight digression.

Replevin was originally confined to cases of wrongful distress. It was also the only action in those cases, trespass not being admissible.[3] A distrainor, unlike a disseisor, did not take the chattel under a claim of absolute dominion, but only as a security. He had not even so much possession as a bailee. If the distress was carried off by a stranger, the distrainor could not maintain trespass,[4] in which action the goods were always laid as the goods of the plaintiff. That action belonged to the distrainee, as the one disseised. The distrainor must use either the writ of *rescous* or *de parco fracto*, in which the property in the distress was either laid in the distrainee, or not laid in any one. Trespass and replevin were thus fundamentally distinct and mutually exclusive actions. The one was brought against a disseisor; the other against a custodian. The former was a personal action, the latter a real action. Trespass presupposed the property in the defendant, whereas replevin assumed the property in the plaintiff, at the time of action brought.[5]

[1] Bract. 161 b; Sparks Case, Cro. El. 676; Co. Lit. 57 a, n. (3); Booth, R. Act. (2d ed.) 285; 2 L. Q. Rev. 488; [1 Nich. Britt, 278, 287, Note in MS. N; Blunden *v.* Baugh, Cro. Car. 302, 304].

[2] The conveyance was not necessarily coextensive with the acquisition. If the feoffment was for life the reversion was in the feoffor. Challis, R. Prop. 329.

[3] Ab. Pl. 265, col. 2, rot. 5; 5 Rot. Par. 139 b.

[4] Y. B. 20 H. VII. 1-1; Rex *v.* Cotton, Park. 113, 121.

[5] Accordingly, even after replevin became concurrent with trespass, if a plaintiff had both writs pending at once for the same goods, the second writ was abated for the "*contrariositie*" of the supposal of the two writs. Y. B. 8 H. VI. 27-17; 22 H. VI. 15-26; 14 H. VII. 12-32.

If, therefore, when the sheriff came to replevy goods, as if distrained, the taker claimed them as his own, the sheriff was powerless. The writ directed him to take the goods of the plaintiff, detained by the defendant. But the goods were no longer the plaintiff's; the defendant by his claim had disseised the plaintiff and made them his own. The plaintiff must abandon his action of replevin as misconceived, and proceed against the defendant, as a disseisor, by appeal of felony, or trespass.[1]

Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The goods were returned to him as goods wrongfully replevied, and the plaintiff, as before, was driven to his appeal or trespass.[2]

The law was so far changed by the judges in 1331, that if the defendant allowed the sheriff to take the goods, he could not afterwards abate the action by a claim of title.[3]

But it was still possible for the defendant to claim property before the sheriff and so arrest further action by him. To meet this difficulty, the writ *de proprietate probanda* was devised, probably in the reign of Edward III. By this writ the sheriff was directed to replevy the goods, notwithstanding the defendant's claim, if by an inquest of office the property

[1] 1 Nich. Britt. 138. "If the taker or detainer admit the bailiff to view and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not villein of the deforceor, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony, if he thinks fit to do so." Compare the case of an estray. 1 Nich. Britt. 68. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost, in form of trespass, or an appeal of larceny, by words of felony."

[2] Y. B. 21 & 22 Ed. I. 106; Y. B. 32 & 33 Ed. I. 54. If the defendant, instead of claiming title in himself, alleged title in a third person, he could only defeat the action by proof of the fact alleged. Y. B. 32 Ed. I. 82; Y. B. 34 Ed. I. 148.

[3] Y. B. 5 Ed. III. 3-11. The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. See also Y. B. 21 Ed. IV. 64 a-35, and Y. B. 26 H. VIII. 6-27. There is an echo of the old law in Y. B. 7 H. IV. 28 b-5. "And also it was said that if one claims property in court, against this claim the other shall not aver the contrary — *credo quod non est lex.*"

was found in the plaintiff's favor. This finding for the plaintiff had no further effect than to justify the sheriff in replevying the goods, and thus to permit the plaintiff to go on with the replevin action just as he would have done had the defendant allowed the sheriff to take the goods.[1] Replevin thus became theoretically concurrent with trespass.[2] A disseisor could not thereafter gain the absolute property by his tort. A writ in trespass for carrying off and killing the plaintiff's horse was no longer assailable for repugnancy. In 1440, to a count in trespass for taking a horse, the defendant pleaded that he took it *damage feasant* to his grain, which the plaintiff had carried off. It was objected that the plea was bad, as showing on its face that the grain was the plaintiff's by the taking. But the court allowed the plea on the ground that the defendant might have brought a replevin for the grain which proved the property in him at his election.[3] It became a familiar notion that the dispossessed owner might affirm the property in himself by bringing replevin, or disaffirm it by suing in trespass. In other words, there was a disseisin by election in personalty as well as in realty.

The disseisee's right *in rem*, however, was still a qualified

[1] Y. B. 1 Ed. IV. 9-18.

[2] Y. B. 7 H. IV. 28 b-5, *per* Gascoigne, C. J.; Y. B. 19 H. VI. 65-5, *per* Newton, C. J.; Y. B. 2 Ed. IV. 16-8, *per* Danby, C. J.; Y. B. 6 H. VII. 7-4, *per* Brian, C. J., and Vavasor, J.; Y. B. 14 H. VII. 12-22. In fact, there are no reported cases of replevin for trespass from the time of Edward III. to the present century. See Mellor *v.* Leather, 1 E. & B. 619. Almost at the same time that the scope of replevin was enlarged, there was a similar duplication of remedies against the disseisor of land. Originally, if we except the writ of right, the assize of novel disseisin (or writ of entry in the nature of assize), which was the counterpart of trespass *de bonis asportatis*, was the exclusive remedy against a disseisor. Trespass *quare clausum fregit* was confined to cases of entry not amounting to an ouster. If, therefore, the defendant in a writ of trespass claimed the freehold, the writ was abated. The plaintiff must proceed against him as a disseisor by the assize. 2 Br. Note Book, 378; Ab. Pl. 142, col. 1, rot. 9 [1253]; Ab. Pl. 262, col. 1, rot. 18 [1272]. About 1340, trespass *quare clausum* was allowed for a disseisin. Y. B. 11 & 12 Ed. III. 503-505, 517-519; Y. B. 14 Ed. III. 231.

[3] Y. B. 19 H. VI. 65-5.

[4] Br. Ab. Replev. 39; Y. B. 6 H. VII. 8 b-4; Y. B. 14 H. VII. 12-22; Russell *v.* Pratt, 4 Leon. 44-46; Bishop *v.* Montague, Cro. Eliz. 824; Bagshaw *v.* Gaward, Yelv. 96; Coldwell's Case, Clayt. 122, pl. 215; Power *v.* Marshall, 1 Sid. 172; 1 Roper, H. & W. (Jacob's ed.) 169.

right; for replevin was never allowed in England against a vendee or bailee of a trespasser, nor against a second trespasser.[1] It was only by the later extension of the action of detinue that a disseisee finally acquired a perfect right *in rem*. Detinue, although its object was the recovery of a specific chattel, was originally an action *ex contractu*. It was allowed only against a bailee or against a vendor, who after the sale and before delivery was in much the same position as a bailee. So essential was the element of privity at first, that in England, as upon the Continent, during the life of a bailee, he only was liable in detinue even though the chattel, either with or without the bailee's consent, were in the possession of a third person.[2] In counting against a possessor after the bailee's death, the bailor must connect the defendant's possession with that of the bailee, as by showing that the possessor was the widow, heir, or executor of the bailee, or otherwise in a certain privity with him.[3] Afterwards, a bailor was permitted to charge a sub-bailee in detinue in the lifetime of the bailee.[4] This action seems to have been given to a loser as early as the reign of Edward III.[5] But it was a long time before the averment of the plaintiff's loss of his goods became a fiction. As late as 1495, the conservative Brian, C. J., said, "He from whom goods are taken cannot have detinue."[6] His companion, Vavasor, J., it is true, expressed a contrary opinion in the same case, as did Anderson, C. J., in Russell *v.* Pratt[7] (1579), and the court in Day *v.* Bisbitch[8] (1586). But it was not until 1600 that Brian's opinion can be said to have been finally abandoned. In that year the comparatively modern action of trover, which had already nearly supplanted detinue *sur trover*, was allowed against a trespasser; although even then two judges dissented, because by the

[1] Mennie *v.* Blake, 6 E. & B. 847.
[2] Y. B. 24 Ed. III. 41 a-22; Y. B. 43 Ed. III. 29-11; [Seld. Soc. Sel. Cas. Ch. No. 116].
[3] Y. B. 16 Ed. II. 490. But see Y. B. 9 H. V. 14-22.
[4] Y. B. 11 H. IV. 46 b-20; Y. B. 10 H. VII. 7-14.
[5] Y. B. 2 Ed. III. 2-5.
[6] Y. B. 6 H. VII. 9-4. See also 1 Ch. Pl. (7 ed.) 137.
[7] 4 Leon. 44, 46.
[8] Ow. 70.

taking "the property and possession is divested out of the plaintiff." [1] As the averments of losing and finding were now fictions, trover was maintainable by the disseisee against any possessor.

The disseisee's right to maintain replevin and detinue (or trover) being thus established, we have now to inquire how far the rules which were found to govern in the disseisin of land apply to the disseisin of goods.

So long as the adverse possession continues, the dispossessed owner of the chattel has, manifestly, no power of present enjoyment. Has he lost also the power of alienation? His right *in rem*, if analyzed, means a right to recover possession by recaption or action. But these rights are as personal in their nature as the corresponding rights of entry or action in the case of land. It follows, then, that they were not transferable. And such was the law.

In 1462, Danby, C. J., and Needham, J., agreed, it is true, that a bailor whose goods had been wrongfully taken from the bailee might give them to the trespasser.[2] This was against the opinion of Littleton, counsel for the plaintiff, who said, "I think it is a void gift; for when S. took them from me [bailee] the property was in him and out of you [bailor]; how, then, could you give them to him?" "*Et bene dixit*," is Brooke's comment.[3] The view of the two judges was taken by Vavasor, J., also, in a like case in 1495. But one of the greatest of English judges, Brian, C. J., expressed himself clearly to the contrary: "The gift is void. . . . In my opinion the property is devested by the taking, and then he had only a right of property; and so the property and right of property are not all one. Then, if he has only a right, this gift is void; for one cannot give his right." [4] Three years later he reaffirmed his opinion in the same case: "The gift is void to him who had the goods as much as it would be to a stranger, and I think a gift to a stranger is void in such a case." [5]

[1] Bishop *v.* Montague, Cro. El. 824, Cro. Jac. 50.
[2] Y. B. 2 Ed. IV. 16-8; Perk. § 92.
[3] Bro. Ab. Replev. 39.
[4] Y. B. 6 H. VII. 9-4.
[5] Y. B. 10 H. VII. 27-13.

In Russell *v.* Pratt[1] (1579) there is this *dictum* by Manwood, C. B.: "If my goods be taken from me, I cannot give them to a stranger; but if my goods come to another by trover, I may give them over to another." The law on this point is thus summarized in "Shepard's Touchstone," the first edition of which was published in 1648: "Things in action are not grantable over to strangers but in special cases. . . . And, therefore, if a man have disseised me of my land or taken away my goods, I may not grant over this land or these goods until I have seisin of them again. . . . And if a man take goods from me, or from another man in whose hands they are; or I buy goods of another man and suffer them in his possession, and a stranger takes them from him, it seems, in these cases, I may give the goods to the trespasser, because the property of them is still in me [*i. e.*, his acceptance of them is an admission of property in the donor; but they cannot be given to a stranger, since without such an admission the party has merely a right of action or resumption by recaption]."[2] The bracketed part of this extract was added in 1820 by Preston, the learned editor of the sixth edition. No later allusion to this subject has been found in the English books; but there are several American decisions which might have been given by Brian himself. In McGoon *v.* Ankeny[3] (1850), for instance, the *ratio decidendi* was thus expressed by the court: "While the property was thus held adversely, the real owner had but a

[1] 4 Leon. 44, 46. See also Rosse *v.* Brandstide, 2 R. & M. R. 438, 439; Benjamin *v.* Bank, 3 Camp. 417.

[2] Shep. Touch. (6 ed.) 240, 241.

[3] 11 Ill. 558. To the same effect, Goodwyn *v.* Lloyd, 8 Port. 237; Brown *v.* Lipscomb, 9 Port. 472; Dunkin *v.* Williams, 5 Ala. 199; O'Keefe *v.* Kellogg, 15 Ill. 347; Taylor *v.* Turner, 87 Ill. 296 (*semble*); Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Young *v.* Ferguson, 1 Litt. 298; Gardner *v.* Adams, 12 Wend. 297; Morgan *v.* Bradley, 3 Hawks, 559; Stedman *v.* Riddick, 4 Hawks, 29; Overton *v.* Williston, 31 Pa. 155.

But see *contra*, Tome *v.* Dubois, 6 Wall. 548; Brig Sarah Ann, 2 Sumn. 206, 211 (*semble*); Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Me. 147; Smith *v.* Kennett, 18 Mo. 154; Hall *v.* Robinson, 2 Comst. 296 (*semble*); Kimbro *v.* Hamilton, 2 Swan, 190; [Gaskill *v.* Barbour, 62 N. J. 530 (*semble*); McGinn *v.* Worden, 3 E. D. Sm. 355 (*semble*)].

Compare Holly *v.* Huggerford, 8 Pick. 73; Boynton *v.* Willard, 10 Pick. 166; Carpenter *v.* Hale, 8 Gray, 157, 158; Clark *v.* Wilson, 103 Mass. 219, 222.

right of action against the person in possession, which was not the subject of legal transfer." And the case was followed in Illinois in 1887.[1] Again we read, in Overton *v.* Williston[2] (1858): "If one wrongfully converts the property of another to his own use, and continues in adverse enjoyment of it, the owner cannot sell to a third person, so as to give his vendee a right of action in his own name."

Not much is to be found in the books as to one's power to dispose, by will, of chattels adversely held. It is plain, however, that before 1330 the disseisee had nothing that he could bequeath. At that time the only remedies for a wrongful taking were trespass and the appeal of felony, both of which actions died with the person wronged.[3] A statute in that year gave to the executor an action to recover damages against a trespasser in like manner as the testator might have recovered if living.[4] The executor of a distrainee or bailor could maintain replevin or detinue, as the testator had the property at his death. After these actions were allowed against a trespasser, since the right to maintain them proved property in the dispossessed owner at his election, his executor could use them as well as trespass against a trespasser.[5] It was, however, only a right of action that the executor acquired in such a case. The chattels themselves passed to the executor only when the testator died in possession. An executor counting on his title regularly stated that the testator died seised.[6] In abridging one case, Fitzherbert adds, "And so see that dying seised of goods is material."[7] Finch's statement also is explicit: "All one's own chattels, real . . . or personal, but not those he is only to recover damages for, as in goods taken from him, or to be accounted for, . . . may be given away or devised by his testament."[8]

The analogy between chattels and lands in regard to the

[1] Erickson *v.* Lyon, 26 Ill. Ap. 17.
[2] 31 Pa. 155, 160.
[3] Staunf. Pl. Cor. 60, b.
[4] 4 Ed. III. c. 7.
[5] Russell *v.* Pratt, 4 Leon. 44; Le Mason *v.* Dixon, W. Jones, 173.
[6] Y. B. 47 Ed. III. 23-55; Fitz. Ab. Replic. 70; Y. B. 7 H. VI. 35-36; Y. B. 28 H. VI. 4-19. See Hudson *v.* Hudson, Latch, 214.
[7] Fitz. Ab. Replic. 60.
[8] Finch, Law, Bk. 2, c. 15.

assignability of the disseisee's interest holds good also, with one exception, in the case of involuntary transfers. Thus the bankrupt's right to recover possession of goods wrongfully taken passes by a true succession to the statutory assignee.[1] But it is only a chose in action that passes, not the goods themselves.[2]

In case of death, the administrator represents the *persona* of the intestate, as the heir stood in the place of the ancestor.

The one exception to the parallel between land and goods is the case where the dispossessed owner of a chattel died intestate, leaving no next of kin, or was convicted of felony or outlawed. His right of action vested in the Crown, in the first case as *bonum vacans*, in the others by forfeiture. The king, unlike a feudal lord claiming by escheat, was a true successor. He was also entitled to choses in action as well as to choses in possession; for the sovereign, whether as assignor or assignee, was an exception to the rule that choses in action are not assignable, unless the claim was for a battery or other personal injury. In 1335 an outlaw who had been pardoned brought an action of trespass for a battery committed before the outlawry. As a pardon did not carry with it a restoration of anything forfeited, it was objected that the claim was extinguished. But the court gave judgment for the plaintiff, Shard (Sharshull, C. J.?) saying, "If this were an action for goods and chattels carried off . . . peradventure it would not be entertained; because if goods had been in the outlaw's possession, the king would have them, and for the like reason, the king should have his action against those who wrongfully took them. But here the wrong would go unpunished if the action were not allowed." [3]

The lord of a villein was entitled to the latter's chattels

[1] Edwards *v.* Hooper, 11 M. & W. 363.

[2] "Where the conversion takes place before the bankruptcy, the assignees have a right of action, but have not the property in the goods." Lord Abinger, in Edwards *v.* Hooper, 21 L. J. Ex. 304, 305. The learned Chief Baron evidently used "property" as Brian, C. J., did, in contradistinction to right of property.

[3] Y. B. 29 Lib. Ass. pl. 63. See also Y. B. 6 H. VII. 9-4, and 10 H. VII. 27-13.

if he elected to claim them. But he must, at his peril, make his election before the villein was disseised. The villein's chose in action against the disseisor was not assignable.[1]

There is nothing in the law of personalty corresponding to dower in land. But the husband's right to his wife's chattels may be compared to his right of curtesy in her land. As was seen, the husband of a woman who was not seised of the land during the marriage was not entitled to curtesy. So a man who married a disseisee of chattels acquired no interest therein, unless during the marriage he reduced her right *in rem* to possession by recaption or by action in their joint names. Her right of action, in other words, was no more assignable than that of the villein. Fitzherbert treated the two cases as illustrations of the same principle.[2] The doctrine was clearly stated by the court in Wan *v.* Lake.[3] "If the wife had been dispossessed [of the term] before marriage, and no recovery during the coverture, the representative of the wife should have the term and not the husband, because it is then a chose in action." The rule has been applied, in a number of cases, to chattels personal.[4]

Finally, the disseisee of a chattel, like the disseisee of land, has at common law nothing that can be taken on execution. In a valuable book published in 1888 we read: "When personal property is held adversely to its owner, his interest

[1] "If the beasts of my villein are taken in name of distress, I shall have a replevin, although I never seized them before, for the property is in my villein, so that suing of this replevin is a claim which vests the property in me. But it is otherwise if he who took the beasts claimed the property." Fitz. Ab. Replevin, 43. Coke, following Fitzherbert, says: "If the goods of the villein be taken by a trespass, the lord shall have no replevin, because the villein had but a right." Co. Lit. 145 b.

[2] Fitz. Ab. Replevin, 43.

[3] Gilb. Eq. 234. See also Co. Lit. 351 a, b; 4 Vin. Ab. 53; Y. B. 20 Ed. I. 174; Milne *v.* Milne, 3 T. R. 627.

[4] Magee *v.* Toland, 8 Port. 36 (*semble*); McNeil *v.* Arnold, 17 Ark. 154, 178 (*semble*); Fightmaster *v.* Beasley, 1 J. J. Marsh. 606; Duckett *v.* Crider, 11 B. Mon. 188, 191 (*semble*); Sallee *v.* Arnold, 32 Mo. 532, 540 (*semble*); Johnston *v.* Pasteur, Cam. & Nor. 464; Norfeit *v.* Harris, Cam. & Nor. 517; Armstrong *v.* Simonton, 2 Tayl. 266, 2 Murph. 351, a. c.; Spiers *v.* Alexander, 1 Hawks, 67, 70 (*semble*); Ratcliffe *v.* Vance, 2 Mill, Const. R. 239, 242 (*semble*); Harrison *v.* Valentine, 2 Call, 487, cited. See also 1 Bishop, Mar. Wom. § 71. But see *contra*, Wellborne *v.* Weaver, 17 Ga. 267, 270 (*semble*); Pope *v.* Tucker, 23 Ga. 484, 487 (*semble*).

therein is a mere chose in action and cannot be reached by execution, unless by the provisions of some statute." [1]

The position of the disseisor of a chattel was the converse of that of the disseisee. The converter, like the disseisor of land, had the power of present enjoyment and the power of alienation. If dispossessed by a stranger he might proceed against him by trespass, replevin, detinue, or trover.[2] He could sell the chattel[3] or bail it.[4] It would go by will to the executor or be cast by descent upon the administrator;[5] was forfeited to the Crown for felony;[6] and was subject to execution. A conversion by the wife, unless the property was destroyed, was necessarily to the use of the husband,[7] as a disseisin by a villein must have profited his lord if the latter claimed it.

We have thus far considered only the resemblances between land and chattels in the matter of seisin and disseisin. But our comparison would be incomplete if attention were not called to one point of difference. One in possession of a horse or cow was seised of the chattel itself, without more. There could, therefore, be but a single seisin of it at any given moment. If, for instance, a chattel was loaned for a term, the bailee alone was seised of it. He, and he only, could be disseised of it. To this day the bailor for a term cannot maintain trespass or trover against a stranger for a disseisin of the bailee. But, on the other hand, there was no such thing as seisin of land *simpliciter*. The seisin was always qualified by the mode of possession. One was seised

[1] Freeman, Executions (2d ed.), s. 112. See to the same effect Wier *v.* Davis, 4 Ala. 442; Horton *v.* Smith, 8 Ala. 900; Doe *v.* Haskins, 15 Ala. 620, 622 (*semble*); Thomas *v.* Thomas, 2 A. K. Marsh. 430; Commw. *v.* Abell, 6 J. J. Marsh. 476.

[2] Bro. Ab. Tresp. 433; Maynard *v.* Bassett, Cro. El. 819; Woadson *v.* Newton, 2 Str. 777.

[3] James *v.* Pritchard, 7 M. & W. 216; Bigelow, Estoppel (4th ed.), 489, 490; Bohannon *v.* Chapman, 17 Ala. 696.

[4] Shelbury *v.* Scotsford, Yelv. 23; Bigelow, Estoppel, 490; [Y. B. 5 Hen. VII 15-5].

[5] Norment *v.* Smith, 1 Humph. 46 and Moffatt *v.* Buchanan, 11 Humph. 369, are *contra*. But these decisions seem indefensible.

[6] *Supra*, p. 24, n. 3; Y. B. 6 H. VII. 9-4.

[7] Hodges *v.* Sampson, W. Jones, 443; Keyworth *v.* Hill, 3 B. & Ald. 685. In Tobey *v.* Smith, 15 Gray, 535, a count alleging a conversion by the wife of A to their use was adjudged bad on demurrer. The conversion should have been laid to the use of the husband only.

either *ut de feodo vel libero tenemento*, or else *ut de termino*. Accordingly, wherever there was a term there were necessarily two distinct seisins in one and the same land, at one and the same time. Both of these seisins were lost by the tortious entry of a stranger upon the land under a claim of right, and the disseisor was exposed to two actions, — the assize of novel disseisin by the freeholder, and the *ejectio firmæ* by the termor. This difference between land and chattels is obviously artificial and of feudal origin.

But if this historical sketch has been accurately drawn, the disseisin of land finds its almost perfect counterpart in the conversion of chattels, notwithstanding the difference here indicated. It is still true that the doctrine of disseisin belongs not to feudalism alone, but to the general law of property. In a subsequent paper, the writer will endeavor to show that this doctrine is not a mere episode in English legal history, but that it is a living principle, founded in the nature of things, and of great practical value in the solution of many important questions.

II

THE NATURE OF OWNERSHIP

In the foregoing pages the writer has endeavored to show, in the light of history, that disseisin was not a feudal doctrine, but a principle of property in general, personal as well as real. Conversion of chattels, we found, differed from disseisin of land in name, but not in substance. In each case the effect of the tort was to transfer the *res* to the wrongdoer, and to cut down the interest of the party wronged to a mere right to recover the *res*. Or, as the sagacious Brian, C. J., put it, the one had the property, the other only the right of property.

The disseisor, whether of land or chattels, was said to have the property, for these reasons. So long as the disseisin continued he had the power of present enjoyment of the *res*; his interest, although liable to be determined at any moment by the disseisee, was as fully protected against all other assailants as the interest of an absolute owner; and,

finally, his interest was freely transferable, both by his own act and by operation of law, although, of course, by reason of its precarious nature, its exchangeable value was small. The disseisee, on the other hand, was said to have a mere right of property, because, although he was entitled to recover the *res* by self-redress, or by action at law, this was his only right. The disseisin deprived him of the two conspicuous marks of perfect ownership. He could neither enjoy the land or chattel *in specie*, nor bring either of them to market. The interest of the disseisor might have little exchangeable value; but that of the disseisee had none. For, as we have seen, this interest, being a *chose* in action, was not transferable at common law, either by conveyance *inter vivos*, or by will, nor even, as a rule, by operation of law.

Are these doctrines of the old common law accidents of English legal history, or are they founded in the nature of things? Do they chiefly concern the legal antiquarian, or have they also a practical bearing upon the litigation of to-day? To answer these questions, it will be necessary, in the first place, to analyze the idea of "ownership" or "property," in the hope of working out a definition that will bear the test of application to concrete cases; and, secondly, an attempt must be made to explain the reason of the rule that *choses* in action are not assignable.

It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet every one would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently. the power of transfer, their interest is either of limited duration, or

altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then, and then only, is the title completely legal." [1]

A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession. If these two elements are vested in different persons there is a divided ownership. Let us test these results by considering some of the modes by which a perfect title may be acquired by one who has neither, or only one of these two elements of complete ownership.

The typical case of title by original acquisition is title by occupation. For the occupier of a *res nullius* does acquire a perfect title and not merely possession. The fisherman who catches a fish out of the sea, or the sportsman who bags a bird, is at once absolute owner. He has possession with the unqualified right of possession, since there is no one *in rerum natura* who can rightfully interfere with him. It is on the same principle that a stranger who occupies land on the death of a tenant *pur auter vie* is owner of the residue of the life estate. For no one during the life of *cestui que vie* can legally disturb him.

[1] 2 Bl. Com. 199. See also ibid. 196: "And, at all events, without such actual possession no title can be completely good."

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.

There is one curious case of derivative title which may be thought to confirm in a somewhat striking manner the accuracy of the definition here suggested. If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder after a life estate in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainderman no remedy against the life tenant. There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bailment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor.[1] Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute.[2]

[1] Perrot *v.* Austin, Cro. El. 222; Cover *v.* Stem, 67 Md. 449.
[2] After a time the chancellors gave relief by compelling life tenants

Another rule, now obsolete, admits of a similar explanation. In the fourteenth century, as we have seen, a trespasser acquired the absolute property in the chattel wrongfully taken. The common law gave the dispossessed owner no remedy for its recovery. There was no assise of novel disseisin for chattels. Replevin was restricted to cases of wrongful distress. Detinue, originally founded upon a bailment, and afterwards extended to cases of losing and finding, was not allowed against a trespasser until about 1600. Trespass was therefore the owner's only action; but Trespass sounded in damages. The trespasser's possession being inviolable, he was necessarily owner.

A derivative title may be acquired by an equitable estoppel. If the owner of land permits another to sell and convey it, as if it were the seller's own, the purchaser gets at law only the seisin. The original owner's title, that is, his right to recover the seisin, is not otherwise affected by the conveyance. But a court of equity will grant a permanent injunction against the owner's assertion of his common-law right, and thereby practically nullify it, so that the purchaser's title is substantially perfect.

Where the two elements of ownership are severed, as by a disseisin, and vested in two persons, either may conceivably make his defective title perfect; but the mode of accomplishing this is different in the two cases. The disseisee may regain his lost possession by entry or recaption, by action at law, or by a voluntary surrender on the part of the disseisor. In each of these ways his title becomes complete, and is the result of a transfer, voluntary or involuntary, of the physical *res*.

The perfection of the title of the disseisor, on the other hand, is not accomplished through a transfer to him of the disseisee's right to recover possession. In the very nature of things, this right of the dispossessed owner cannot be

to give bonds that the reversioners and remaindermen should have the chattels. Warman *v.* Seaman, Freem. C. C. 306, 307; Howard *v.* Duke of Norfolk, 2 Sw. 464; 1 Fonb. Eq. 213, n.; [Cole *v.* Moore, Moo. 806]. And now either in equity or at law the reversioners and remaindermen are amply protected. The learning on this point, together with a full citation of the authorities, may be found in Gray, Perpetuities, §§ 78-98.

conveyed to the wrongful possessor. It would be absurd to speak of such possessor acquiring a right to recover possession from himself, which would be the necessary consequence of the supposed transfer. But the disseisee's right, although not transferable, may, nevertheless, be extinguished. And since, by its extinguishment, the possession of the disseisor becomes legally unassailable, the latter's ownership is thereby complete.

The extinguishment may come about in divers ways:—

(1.) *By a release.* "Releases of this kind must be made either to the disseisor, his feoffee, or his heir. In all these cases the possession is in the releasee; the right in the releasor and the uniting the right to the possession completes the title of the releasee."[1] In feoffments and grants it was a rule that the word "heirs" was essential to the creation of an estate of inheritance. But, as Coke tells us, "When a bare right is released, as when the disseisee releases to the disseisor all his right, he need not speake of his heires."[2] This distinction would seem to be due to the fact that a release operates, not as a true conveyance, but by way of extinguishment.

(2.) *By marriage.* As we have seen in the preceding article,[3] if a woman, who was dispossessed of her land or chattels, married, her right of action against the wrong-doer, not being assignable, did not pass to her husband. If, therefore, she died before possession was regained, the husband had no curtesy in the land, and the right to recover the chattel passed to her representative. But if the dispossessed woman can be imagined to marry the dispossessor, it seems clear, although no authority has been found,[4] that in that highly improbable case the marriage, by suspending and consequently extinguishing her right of action, would give the husband a fee simple in the land and absolute ownership of the chattel.

(3). *By death.* If a man were disseised by his eldest son

[1] Co. Lit. 274 a, Butler's note [237].
[2] Co. Lit. 9 b.
[3] *Supra*, 27, 38.
[4] A woman by marrying her bailee or debtor extinguished the bailment or debt. Y. B. 21 H. VII. 29-4.

and died, the son and heir would be complete owner; for death would have removed the only person in the world who could legally assail his possession. The law of trusts furnishes another illustration. The right of a *cestui que trust*, it is true, is not a right *in rem*, but a right *in personam*. Nevertheless it relates to a specific *res*, and so long as it exists, practically deprives the trustee of the benefits of ownership. If this right of the *cestui que trust* could be annihilated, the trustee would be owner in substance as well as in name. This annihilation occurred in England, if the *cestui que trust* of land died intestate and without heirs, inasmuch as a trust of land did not escheat to the crown or other feudal lord.[1] The trust was said to sink for the benefit of the trustee, and for the obvious reason that no one could call him to account.

(4.) *By lapse of time.* Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition.[2] As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's

[1] Burgess *v.* Wheate, 1 W. Bl. 123; Ames, Cas. on Trusts, 501, 511, n. 1. By St. 47 and 48 Vict. c. 71, § 4, equitable interests do now escheat. It has been urged by Mr. F. W. Hardman, with great ability, that a trust in land ought to have been held to pass to the sovereign after the analogy of *bona vacantia*. 4 L. Q. Rev. 330-336. And this view has met with favor in this country. Johnston *v.* Spicer, 107 N. Y. 185; Ames, Cas. on Trusts, 511, n. 1.

[2] The writer regrets to find himself in disaccord upon this point with the opinion expressed incidentally by Professor Langdell, in his Summary of Equity Pleading (2 ed.), § 122.

title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem . . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione, per patientiam et negligentiam veri domini.*" [1]

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title." [2] Lord Mansfield may also be cited: "Twenty years' adverse possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession." [3]

Sir Thomas Plummer, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by any one. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity." [4]

There are, to be sure, occasional *dicta* to the effect that the statute of James I. only barred the remedy without ex-

[1] Bract. 52 a.

[2] 2 Bl. Com. 196; see also 3 Bl. Com. 196; 1 Hayes, Conveyancing (5 ed.), 270; Stokes *v.* Berry, 2 Salk. 421, per Lord Holt. Butler's note in Co. Lit. 239 a is as follows: "But if A. permits the possession to be withheld from him [by B.] beyond a certain period of time, without claiming it . . . B.'s title in the eye of the law is strengthened, and A. can no longer recover by a possessory action, and his only remedy then is by an action on the right . . . so that if he fails to bring his writ of right within the time limited for the bringing of such writs, he is remediless, and the title of the dispossessor is complete."

[3] Taylor *v.* Horde, 1 Burr. 60, 119. [See Leffingwell *v.* Warren, 2 Black, 599, 605, per Swayne J.; Davis *v.* Mills, 194 U. S. 451, 456-7 per Holmes J.; Moore *v.* Luce, 29 Pa. 260, 262, per Lewis C. J.]

[4] Cholmondeley *v.* Clinton, 2 Jac. & W. 1, 156.

tinguishing the right, and that the right which would support a writ of right or other droitural action never died. An immortal right to bring an eternally prohibited action is a metaphysical subtlety that the present writer cannot pretend to understand.[1] Fortunately these *dicta* have had no other effect than to bring some unnecessary confusion of ideas into this subject. The logic of facts has proved irresistible in the decision of concrete cases. The courts have uniformly held that a title gained by lapse of time is not to be distinguished from a title acquired by grant.[2] Thus, if the prescriptive owner desires to transfer his title, he must observe the usual formalities of a conveyance; he cannot revest the title in the disseisee by disclaiming the benefit of the statute.[3] His title is so perfect that a court

[1] ["The idea that the title to property can survive the loss of every remedy known to the law for reducing it to possession and enjoyment would seem to have but small support in logic or reason." Per O'Brien J. in Baker *v.* Oakwood, 123 N. Y. 16, 26.] The notion that a debt survives the extinction of all remedies for its enforcement is peculiar to English and American law, and even in those systems cannot fairly be deduced from the authorities commonly cited in its support. It is not because the debt continues, that a new promise to pay a debt barred by the statute is binding; but because the extinguishment of the creditor's right is not equivalent to performance by the debtor. The moral duty to pay for the *quid pro quo* remains, and is sufficient to support the new promise. It is because this moral duty remains that the debtor, though discharged from all actions, cannot, without payment, recover any security that the creditor may hold. Again, it has been urged that the statute affects the remedy, but not the right, because the lapse of the statutory time in the jurisdiction of the debtor is no bar to an action in another jurisdiction. But this rule admits of another explanation. A debt being transitory, a creditor has an option, from the moment of its creation, to sue the debtor wherever he can find him. The expiration of the period of limitation in one jurisdiction, before he exercises his option, has no effect upon his right to sue elsewhere. But it extinguishes his right to sue in the jurisdiction where the statute has run, and a subsequent repeal of the statute will not revive it. Cooley, Const. Lim. 365. The case of Campbell *v.* Holt, 115 U. S. 620, *contra*, stands almost alone.

[2] [This statement is too sweeping. A conveyance by A of Blackacre, wholly surrounded by other land of A, would give the grantor by implication a way of necessity across the surrounding land. But a disseisor of Blackacre acquires no way of necessity. Wilkes *v.* Greenway, 6 T. L. R. 449; McLaren *v.* Strachan, 23 Ont. L. R. 120, n.]

[3] Sanders *v.* Sanders, 19 Ch. Div. 373; Hobbs *v.* Wade, 36 Ch. D. 553; Jack *v.* Walsh, 4 Ir. L. R. 254; Doe *v.* Henderson, 3 Up. Can. Q. B. 486; McIntyre *v.* Canada Co., 18 Grant, Ch. 367; Bird *v.* Lisbros, 9 Cal. 1, 5 (*semble*); School District *v.* Benson, 31 Me. 381; Austin *v.* Bailey, 37 Vt. 219; Hodges *v.* Eddy, 41 Vt. 485; [Kibble *v.* Fairthorne [1895] 1 Ch. 219; Jones *v.* Williams, 108 Fla. 282; Parham *v.* Dedman, 66 Ark.

of equity will compel its acceptance by a purchaser.[1] A repeal of the statute will not affect his title.[2] If dispossessed by the disseisee after the statute has run, he may enforce his right of entry or action against him as he might against any other intruder.[3] He may even maintain a bill in equity to remove the cloud upon his title, created by the document-

26; Shirley *v.* Whitlow, 80 Ark. 444; Hudson *v.* Stilwell, 80 Ark. 575; Brown *v.* Cockerell, 33 Ala. 38; Todd *v.* Kauffman, 19 Dist. Col. 304; Ill. Co. *v.* Wakefield, 173 Ill. 565; Riggs *v.* Riley, 113 Ind. 208; Bunce *v.* Bidwell, 43 Mich. 542; Sage *v.* Rudnick, 67 Minn. 362; Allen *v.* Mansfield, 82 Mo. 688; Sailor *v.* Hertzogg, 2 Barr, 182, 184; Bradford *v.* Guthrie, 4 Brewst. (Pa.) 351, 361; Bruce *v.* Washington, 80 Tex. 368; Hughes *v.* Graves, 39 Vt. 359, 365; McDonald *v.* McIntosh, 8 Up. Can. Q. B. 388].

[1] Scott *v.* Nixon, 3 Dr. & War. 388, 405; Sands *v.* Thompson, 22 Ch. D. 614; Games *v.* Bonnor, 54 L. J. Ch. 517; [Cox *v.* Cox, 7 Dist. Col. 1; Crowell *v.* Druley, 19 Ill. Ap. 509; Tewksbury *v.* Howard, 138 Ind. 103; Foreman *v.* Wolf (Md. 1894), 29 Att. R. 837; Trustees *v.* Hilken, 84 Md. 170; Erdman *v.* Corse, 87 Md. 506; Regents *v.* Calvary Church, 104 Md. 635; Dickerson *v.* Kirk, 105 Md. 638; Ballou *v.* Sherwood, 32 Neb. 667; Barnard *v.* Brown, 112 Mich. 452; Seymour *v.* DeLancey, Hopk. 436; Murray *v.* Harway, 56 N. Y. 337, 344; Shriver *v.* Shriver, 86 N. Y. 575; Ottinger *v.* Strasburger, 33 Hun. 466 affd. 102 N. Y. 692; O'Connor *v.* Huggins, 113 N. Y. 511; Pell *v.* Pell, 65 N. Y. Ap. Div. 388; Pratt *v.* Eby, 67 Pa. 396; Shober *v.* Dutton, 6 Phila. 185].

[2] Campbell *v.* Holt, 115 U. S. 620, 622 (*semble*); Trim *v.* McPherson, 7 Cold. 15; Grigsby *v.* Peak, 57 Tex. 142; Sprecker *v.* Wakely, 11 Wis. 432; Hill *v.* Kricke, 11 Wis. 442; Knox *v.* Cleveland, 13 Wis. 245; [Hall *v.* Webb, 21 W. Va. 320; McEldowney *v.* Webb, 44 W. Va. 711].

[3] Brassington *v.* Llewellyn, 27 L. J. Ex. 297; Bryan *v.* Cowdal, 21 W. R. 693; Rains *v.* Buxton, 14 Ch. D. 537; Groome *v.* Blake, 8 Ir. C. L. 3 Ont. R. 26; Holtzapple *v.* Phillibaum, 4 Wash. 356; Barclay *v.* Smith, 66 Ala. 230 (*semble*); Jacks *v.* Chaffin, 34 Ark. 534; Clarke *v.* Gilbert, 39 Conn. 94; Doe *v.* Lancaster, 5 Ga. 39; McDuffee *v.* Sinnott, 119 Ill. 449; Brown *v.* Anderson, 90 Ind. 93; Chiles *v.* Jones, 4 Dana, 479; Armstrong *v.* Risteau, 5 Md. 256; Littlefield *v.* Boston, 146 Mass. 268; Jones *v.* Brandon, 59 Miss. 585; Biddle *v.* Mellon, 13 Mo. 335; Jackson *v.* Oltz, 8 Wend. 440; Pace *v.* Staton, 4 Ired. 32; Pederick *v.* Searle, 5 S. & R. 236; Abel *v.* Hutto, 8 Rich. 42; [Stokes *v.* Berry, 2 Salk. 421; Midland Co. *v.* Wright [1901], 1 Ch. 735 (injunction against disseisee); Hackett *v.* Marmet Co., 52 Fed. 269; So. Dist. *v.* Blakeslee, 13 Conn. 227; Montgomery *v.* Robinson, 4 Del. Ch. 490 (injunction against disseisee); Paulin *v.* Hale, 40 Ill. 274; McDuffie *v.* Sinnott, 119 Ill. 449; Faloon *v.* Simshauser, 130 Ill. 649; Donahue *v.* Ill. Co. 165 Ill. 640; Bradley *v.* Lightcap, 202 Ill. 154; Axmear *v.* Richards, 112 Iowa 657 (injunction against disseisee); Roberts *v.* Sanders, 3 A. K. Marsh. 25; Doe *v.* Fletcher, 37 Md. 480; Waltemeyer *v.* Baughman, 63 Md. 200; Shock *v.* Falls City, 31 Neb. 599 (injunction against disseisee); City *v.* White (Neb. 1897); 70 N. W. R. 50; Rice *v.* Kelly (Neb. 1908) 115 N. W. R. 625; Davock *v.* Nealon, 58 N. J. 21; Spottiswoode *v.* Morris Co., 61 N. J. 322, 63 N. J. 667; Jackson *v.* Dieffendorf, 3 Johns. 269; Barnes *v.* Light, 116 N. Y. 34; Eldridge *v.* Kenning, 35 N. Y. St. Rep. 190 (injunction against disseisee); Schall *v.* Williams Co., 35 Pa. 191, 204; MacGregor *v.* Thompson, 7 Tex. Civ. Ap. 32].

ary title of the original owner.[1] [If sued by the disseisee he may plead in denial of the plaintiff's title.[2]] The English cases cited in support of these propositions, it may be urged, were decided under St. 3 and 4 Wm. IV. c. 27, the 34th section of which expressly extinguishes the title of the original owner at the end of the time limited. But inasmuch as the American cases cited were decided under statutes substantially like St. 21 James I. c. 16, which contains no allusion to any extinguishment of title, the 34th section referred to may fairly be regarded as pure surplusage.

The conclusions reached in regard to land apply with equal force to chattels. The vice in the converter's title is the dispossessed owner's right to recover the chattel by recaption or action. The bar of the statute operating as a perpetual injunction against the enforcement of the right of action virtually destroys that right; and the policy of the law will not permit the dispossessed owner's right to recover by his own act to survive the extinguishment of his right to recover by legal process.[3] The vice being thus re-

[1] Low *v.* Morrison, 14 Grant, Ch. 192; Pendleton *v.* Alexander, 8 Cranch, 462; Arrington *v.* Liscom, 34 Cal. 365; Tracy *v.* Newton, 57 Iowa, 210; Rayner *v.* Lee, 20 Mich. 384; Stettnische *v.* Lamb, 18 Neb. 619; Watson *v.* Jeffrey, 39 N. J. Eq. 62; Parker *v.* Metzger, 12 Oreg. 407; [Sharon *v.* Tucker, 144 U. S. 392; Marston *v.* Rowe, 39 Ala. 722; Van Etten *v.* Daugherty, 83 Ark. 534; Echols *v.* Hubbard, 90 Ala. 309; Norman *v.* Eureka Co., 98 Ala. 181; Torrent Co. *v.* Mobile, 101 Ala. 559; McCormack *v.* Silsby, 82 Cal. 72; Baker *v.* Clark, 128 Cal. 181; Roberson *v.* Downing Co., 120 Ga. 833; Bellefontaine Co. *v.* Niedringhaus, 181 Ill. 426; Wilson *v.* Campbell, 119 Ind. 286; Indep. Dist. *v.* Fagen, 94 Iowa, 676; Severson *v.* Gremm, 124 Iowa, 729; Jenkins *v.* Dewey, 49 Kan. 49; Farmer *v.* Farmer, 19 Ky. L. Rep. 243; Asher Co. *v.* Clemmons, 23 Ky. L. Rep. 771; Gardner *v.* Terry, 99 Mo. 523; McKee *v.* Gardner, 131 Mo. 599 (*semble*); Peterson *v.* Townsend (Neb. 1890) 46 N. W. R. 526; Nash *v.* Lead Co., 15 N. Dak. 566; Moody *v.* Holcomb, 26 Tex. 714; Bellingham *v.* Dibble, 4 Wash. 764; Pitman *v.* Hill, 117 Wis. 318; Clithero *v.* Fenner, 122 Wis. 356].

[2] Nelson *v.* Brodhack, 44 Mo. 596; Fulkerson *v.* Mitchell, 82 Mo. 13; Hill *v.* Bailey, 8 Mo. Ap. 85; Staley *v.* Housel, 35 Neb. 160; Murray *v.* Romine, 60 Neb. 94; Link *v.* Campbell, (Neb. 1905) 104 N. W. R. 939; Furman *v.* Sprague, 82 N. Ca. 366; Cheetham *v.* Young, 113 N. Ca. 161. But see Ten Eyck *v.* Witbeck, 55 N. Y. Ap. Div. 165; Udell *v.* Stearns, 125 N. Y. Ap. Div. 196.

[3] *Ex parte* Drake, 5 Ch. Div. 866, 868; Chapin *v.* Freeland, 142 Mass. 383; cases cited *infra*, n. 4. ["In order to make the title perfect, there must have been something in the nature of an adverse possession for more than six years; then, indeed, the party would have a right to the chattel," per Pollock C. B. in Plant *v.* Cockerill, 5 H. & N., 430, 439-440. See also Davis *v.* Mills, 194 U. S. 451, 457, per Holmes, J.]

moved, the converter's title is unimpeachable; and it is as true of chattels as of land that a prescriptive title is as effective for all purposes as a title by grant. Accordingly, the adverse possessor cannot restore the title to the original owner by waiving the benefit of the statute.[1] His title is not affected by a repeal of the statute.[2] If dispossessed by the original owner, he may maintain Detinue or Replevin against the latter, as he might against any stranger.[3] [He may have an injunction restraining the removal of the chattel by the original owner.[4]] A title gained by lapse of time in one State is good everywhere.[5] If insolvent, he cannot surrender the chattel to the original owner.[6] If sued by the

According to Littleton, a right of entry or reception is not extinguished by a release of all actions; and in Put *v.* Rawsterne, Skin. 48, 57, 2 Mod. 318, there is a *dictum* that the right of reception is not lost, although all rights of action are merged in a judgment in trover. It may be that Littleton's interpretation would be followed to-day, although it certainly savors of scholasticism. But the *dictum* in Put *v.* Rawsterne, surely, cannot be law.

[1] Morris *v.* Lyon, 84 Va. 331.

[2] Campbell *v.* Holt, 115 U. S. 623 (*semble*); Jones *v.* Jones, 18 Ala. 245, 253 (*semble*); Davis *v.* Minor, 2 Miss. 183, 189-90 (*semble*); Power *v.* Telford, 60 Miss. 195 (*semble*); Moore *v.* State, 43 N. J. 203, 206 (*semble*); Yancy *v.* Yancy, 5 Heisk. 353; Brown *v.* Parker, 28 Wis. 21, 28 (*semble*).

[3] Brent *v.* Chapman, 5 Cranch, 358; Shelby *v.* Guy, 11 Wheat. 361 (*semble*); Howell *v.* Hair, 15 Ala. 194; Sadler *v.* Sadler, 16 Ark. 628; Wynn *v.* Lee, 5 Ga. 217 (*semble*); Robbins *v.* Sackett, 23 Kas. 301; Stanley *v.* Earl, 5 Litt. 281; Smart *v.* Baugh, 3 J. J. Marsh. 363 (*semble*); Clarke *v.* Slaughter, 34 Miss. 65; Chapin *v.* Freeland, 142 Mass. 383 (Field, J., diss.); Baker *v.* Chase, 55 N. H. 61, 63 (*semble*); Powell *v.* Powell, 1 Dev. & B. Eq. 379; Call *v.* Ellis, 10 Ired. 250; Cockfield *v.* Hudson, 1 Brev. 311; Gregg *v.* Bigham, 1 Hill (S. Ca.), 299; Simon *v.* Fox, 12 Rich. 392; McGowan *v.* Reid, 27 S. Ca. 262, 267 (*semble*); Kegler *v.* Miles, Mart. & Y. 426; Partee *v.* Badget, 4 Yerg. 174; Wheaton *v.* Weld, 9 Humph. 773; Winburn *v.* Cochran, 9 Tex. 123; Connor *v.* Hawkins, 71 Tex. 582; Preston *v.* Briggs, 16 Vt. 124, 130; Newby *v.* Blakey, 3 Hen. & M. 57; [Hicks *v.* Fluitt, 21 Ark. 463; Currier *v.* Studley, 159 Mass. 17; Pate *v.* Hazell, 107 N. Ca. 189 (*semble*); Ingram *v.* Foster, 4 McC. 198; Waters *v.* Barton, 1 Cold. 450; Bowyer *v.* Robertson, (Tex. Civ. Ap. 1895) 29 S. W. R. 916].

[4] Altoona Co. *v.* R. R. Co. (Pa. 1902) 52 Atl. R. 6.

[5] Shelby *v.* Guy, 11 Wheat. 361; Goodman *v.* Munks, 8 Port. 84, 94-5; Howell *v.* Hair, 15 Ala. 194 (*semble*); Newcombe *v.* Leavitt, 22 Ala. 631; Wynn *v.* Lee, 5 Ga. 217; Broh *v.* Jenkins, 9 Mart. 526 (*semble*); Davis *v.* Minor, 2 Miss. 183 (*semble*); Fears *v.* Sykes, 35 Miss. 633; Moore *v.* State, 43 N. J. 203, 205, 208 (*semble*); Alexander *v.* Burnet, 5 Rich. 189 (*semble*); Sprecker *v.* Wakeley, 11 Wis. 432, 440 (*semble*); [Cargile *v.* Harrison, 9 B. Mon. 518, 521 (*semble*); Waters *v.* Barton, 1 Cold. 450].

[6] Garth *v.* Barksdale, 5 Munf. 101.

original owner, he may plead in denial of the plaintiff's title.[1]

In the cases thus far considered the land or chattel has been assumed to continue in the possession of the disseisor or converter until the bar of the statute was complete. But before that time the wrong-doer may have parted with the *res* by a sale or other transfer, or he may have been, in turn, deprived of it by a second wrong-doer.

If the thing has passed to the new possessor by a sale, the change of possession will produce, so far as the statute of limitations is concerned, only this difference: the title will vest at the end of the period of limitation in the new possessor, instead of the original disseisor or converter. Let us suppose, for example, that B. disseises A., occupies for ten years, and then conveys to C. If the statutory period be assumed to be twenty years, B.'s title at the time of the transfer is good against every one except A., but is limited by the latter's right to recover possession at any time during the ensuing ten years. B.'s title, thus qualified, passes to C. At the end of the second ten years the qualification vanishes, and C. is complete owner. This, it is believed, is the rationale of the oft-repeated rule that the times of successive adverse holders, standing in privity with each other, may be tacked together to make up the period of limitation. In regard to land, this rule of tacking is all but universal.[2]

[1] Campbell *v.* Holt, 115 U. S. 623 (*semble*); Smart *v.* Baugh, 3 J. J. Marsh. 363; Smart *v.* Johnson, 3 J. J. Marsh. 373; Duckett *v.* Crider, 11 B. Mon. 188; Elam *v.* Bass, 4 Munf. 301; [Lay *v.* Lawson, 23 Ala. 377; Traun *v.* Keiffer, 31 Ala. 136].

The general rule is asserted also in Bryan *v.* Weems, 29 Ala. 423; Pryor *v.* Ryburn, 16 Ark. 671; Crabtree *v.* McDaniel, 17 Ark. 222; Machin *v.* Thompson, 17 Ark. 199; Blackburn *v.* Morton, 18 Ark. 384; Morine *v.* Wilson, 19 Ark. 520; Ewell *v.* Tidwell, 20 Ark. 136; Spencer *v.* McDonald, 22 Ark. 466; Curtis *v.* Daniel, 23 Ark. 362; Paschal *v.* Davis, 3 Ga. 256, 265; Wellborn *v.* Weaver, 17 Ga. 267; Thompson *v.* Caldwell, 3 Litt. 136; Orr *v.* Pickett, 3 J. J. Marsh. 269, 278; Martin *v.* Dunn, 30 Miss. 264, 268; Hardeson *v.* Hays, 4 Yerg. 507; Prince *v.* Broach, 5 Sneed, 318; Kirkman *v.* Philips, 7 Heisk. 222; Munson *v.* Hallowell, 26 Tex. 475; Merrill *v.* Bullard, 59 Vt. 389; Garland *v.* Enos, 4 Munf. 504; [Harrison *v.* Pool, 16 Ala. 167, 174; McCombs *v.* Guild, 9 Lea, 81; Thornburg *v.* Lewis, 37 W. Va. 538].

Goodwin *v.* Morris, 9 Oreg. 322, is a solitary decision to the contrary. [There are strong *dicta* to the contrary in Miller *v.* Dell, [1891] 1 Q. B. 468.]

[2] *Ancestor and heir.* Doe *v.* Lawley, 13 Q. B. 954; Clarke *v.* Clarke,

The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land.[1] A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the dispossessed owner's right to

Ir. R. 2 C. L. 395; Currier *v.* Gale, 9 All. 522; Duren *v.* Kee, 26 S. Ca. 224; [Doe *v.* Fletcher, 37 Md. 430; Wickes *v.* Wickes, 98 Md. 307; Alexander *v.* Gibbon, 118 N. Ca. 796; Epperson *v.* Stansill, 64 S. Ca. 485; Bardin *v.* Commercial Co., (S. Ca. 1909) 64 S. E. R. 165; Corder *v.* Dolin, 4 Baxt. 238].

Devisor and devisee. Newcomb *v.* Stebbins, 9 Met. 545; Shaw *v.* Nicholay, 30 Mo. 99; Caston *v.* Caston, 2 Rich. Eq. 1; [Lantry *v.* Wolff, 49 Neb. 374. But see *contra* Burnett *v.* Crawford, 50 S. Ca. 161].

Vendor and vendee. Simmons *v.* Shipman, 15 Ont. R. 301; Christy *v.* Alford, 17 How. 601; Riggs *v.* Fuller, 54 Ala. 141; Smith *v.* Chapin, 31 Conn. 530; Weber *v.* Anderson, 73 Ill. 439; Durel *v.* Tennison, 31 La. An. 538; Chadbourne *v.* Swan, 40 Me. 260; Hanson *v.* Johnson, 62 Md. 25; Crispen *v.* Hannavan, 50 Mo. 536; McNeely *v.* Langan, 22 Oh. St. 32; Overfield *v.* Christie, 7 S. & R. 173; Clark *v.* Chase, 5 Sneed, 636; Cook *v.* Dennis, 61 Tex. 246; Day *v.* Wilder, 47 Vt. 583. But see *contra,* King *v.* Smith, Rice, 10; Johnson *v.* Cobb, 29 S. Ca. 372; [Shufleton *v.* Nelson, 2 Sawy. 540; Holt *v.* Adams, 121 Ala. 664; Memphis Co. *v.* Organ, 67 Ark. 84; Robinson *v.* Nordman, 75 Ark. 593; Montgomery *v.* Robinson, 4 Del. Ch. 490; Hanson *v.* Johnson, 62 Md. 25; Vandall *v.* St. Martin, 42 Minn. 163; Menkens *v.* Blumenthal, 27 Mo. 198; Murray *v.* Romine Co., 60 Neb. 94; Oldig *v.* Fisk (Neb. 1901) 95 N. W. R. 492; Rice *v.* Kelly (Neb. 1908) 115 N. W. 625; Davock *v.* Nealon, 58 N. J. 21; Vance *v.* Wood, 22 Oreg. 77; Wheeler *v.* Taylor, 32 Oreg. 421; West *v.* Edwards, 41 Oreg. 609; Cunningham *v.* Patton, 6 Barr, 355; Hughes *v.* Pickering, 14 Pa. 297; Covert *v.* Pittsburg Co., 204 Pa. 341; Johnson *v.* Simpson, 22 Tex. Civ. Ap. 290; Ill. Co. *v.* Budsisz, 106 Wis. 499; Ill. Co. *v.* Jeka, 119 Wis. 122; Closuit *v.* John Arpin Co., 130 Wiss. 258; Mielke *v.* Dodge (Wis. 1908) 115 N. W. R. 1099; Ill. Co. *v.* Paczocha (Wis. 1909) 119 N. W. R. 550].

Lessor and lessee. Melvin *v.* Proprietors, 5 Met. 15; Sherin *v.* Brackett, 36 Minn. 152.

Judgment debtor and execution purchaser. Searcy *v.* Reardon, 1 A. K. Marsh. 3; Chouquette *v.* Barada, 23 Mo. 331; Scheetz *v.* Fitzwater, 5 Barr, 126.

Wife and tenant by curtesy. Colgan *v.* Pellens, 48 N. J. 27, 49 N. J. 694.

See further, McEntie *v.* Brown, 28 Ind. 347; Haynes *v.* Boardman, 119 Mass. 414; St. Louis *v.* Gorman, 29 Mo. 593; Hickman *v.* Link, 97 Mo. 482.

[1] Bohannon *v.* Chapman, 17 Ala. 696; Newcombe *v.* Leavitt, 22 Ala. 631; Shute *v.* Wade, 5 Yerg. 1, 12 (*semble*); Norment *v.* Smith, 1 Humph. 46, 48 (*semble*); [Hicks *v.* Fluitt, 21 Ark. 463; Dragoo *v.* Cooper, 9 Bush, 629; Thornburg *v.* Bowen, 37 W. Va. 538] (but see Wells *v.* Ragland, 1 Swan, 501; Hobbs *v.* Ballard, 5 Sneed, 395), (*Accord.*

Tacking not being allowed in regard to land in South Carolina, is naturally not permitted there in the case of chattels. Beadle *v.* Hunter, 3 Strob. 331; Alexander *v.* Burnet, 5 Rich. 189; Dillard *v.* Philson, 5 Strob. 213 (*semble*).

recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted, if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself, — a conclusion as shocking in point of justice as it would be anomalous in law.

It remains to consider the operation of the statute when the disseisor or converter has been, in turn, dispossessed by a wrong-doer. A change of possession accomplished in this mode has no more effect upon the right of the original owner than a change of possession by means of a transfer. But the rights and relations of the two successive adverse possessors are fundamentally different in the two cases. Let us suppose, as before, that B. disseises A., and occupies for ten years, and then, instead of selling to C., is disseised by C., who occupies for another ten years. At the moment of the second disseisin B.'s possession is qualified by A.'s right to recover the *res* at any time during the next ten years. After the disseisin C.'s possession would, of course, be subject to the same qualification. But B. had as against the rest of the world the two elements of perfect ownership, — possession and the unlimited right of possession. C. by disseising B. severs these two elements of B.'s title, good against every one but A., in the same way that B. by his tort had previously divided A.'s ownership, good against every one without exception. Just as by the original disseisin B. acquired the *res* subject to A.'s right of entry or action for twenty years, so by the second disseisin C. acquires the *res* subject to B.'s right of entry or action for an equal period. There would be, therefore, two defects in C.'s title; namely, A.'s right to recover the *res* for ten years, and B.'s right to recover it for twenty years from the time of the second disseisin. If A. fails to assert his claim during his ten years, his right is gone forever. One of the defects of C.'s title is blotted out. He becomes owner against every one but B. He may, accordingly, at any time thereafter defend successfully an action brought by A., or if forcibly dispossessed by A., he may recover the *res* from him by entry

or action as he might against any other dispossessor, B. alone excepted. In other words, C., although a disseisor, and therefore not in privity with B., may tack the time of B.'s adverse possession to his own to make out the statutory period against A. This tacking is allowed in England, Canada, and in several of our States.[1] There are, however, some decisions and a widespread opinion to the contrary in this country.[2] But this opinion, with all deference,

[1] Doe *v.* Carter, 9 Q. B. 863; [Willis *v.* Howe, [1893], 2 Ch. 545, 553;] Kipp *v.* Synod, 33 Up. Can. Q. B. 220; Fanning *v.* Willcox, 3 Day, 258; Smith *v.* Chapin, 31 Conn. 530 (*semble*); Shannon *v.* Kinny, 1 A. K. Marsh. 3; Hord *v.* Walton, 2 A. K. Marsh. 620; [Wishart *v.* McKnight, 178 Mass. 356 (explaining the misunderstood case of Sawyer *v.* Kendall, cited in the next note)]; Fitzrandolph *v.* Norman, 2 Tayl. 131; Candler *v.* Lunsford, 4 Dev. & B. 407; Davis *v.* McArthur, 78 N. C. 357; Cowles *v.* Hall, 90 N. C. 330. See, also, 1 Dart, V. & P. (6 ed.) 464-6; Pollock and Wright, Possession, 23.

[2] San Francisco *v.* Fulde, 37 Cal. 349; Doe *v.* Brown, 4 Ind. 143 (*semble*); Sawyer *v.* Kendall, 10 Cush. 241; Witt *v.* St. Paul Co., 38 Minn. 122 (*semble*); Locke *v.* Whitney, 63 N. H. 597 (*semble*); Jackson *v.* Leonard, 9 Cow. 653; Moore *v.* Collishaw, 10 Barr, 224; Shrack *v.* Zubler, 34 Pa. 38; Erck *v.* Church, 87 Tenn. 575; Graeven *v.* Dieves, 68 Wis. 317 (*semble*). See, also, Riopelle *v.* Hilman, 23 Mich. 33.

Doe *v.* Barnard, 13 Q. B. 945, lends no countenance to the cases just cited. In that case B. occupied without right for eighteen years, and died leaving a son; C. excluded the son and occupied for thirteen years, when he was ousted by A., the original owner. C. brought ejectment against A., but failed; not, however, because of any right in A.; on the contrary, the latter, as plaintiff, in an ejectment against C., had been already defeated because the statute had extinguished his title. Doe *v.* Carter, 9 Q. B. 863. The court decided against C. in Doe *v.* Barnard, on the ground that he, being a disseisor of A.'s heir, who had the superior right, could not maintain ejectment at all, even against a wrongful dispossessor. This view, although followed in Nagle *v.* Shea, Ir. R. 8 C. L. 224, is, of course, untenable, being a departure from the law as settled by the practice of six centuries. For, from time immemorial, a disseisor, if dispossessed by a stranger, has had the right to recover the land from the wrong-doer by entry, by assize, or by ejectment. Bract. f. 165 a; 1 Nich. Britt. 296; Bateman *v.* Allen, Cro. El. 437, 438; Jenk. Cent. 42; Allen *v.* Rivington, 2 Saund. 111; Smith *v.* Oxenden, 1 Ch. Ca. 25; Doe *v.* Dyball, M. & M. 346; Davison *v.* Gent, 1 H. & N. 744, per Bramwell, B. [Chisholm *v.* Marshalleck, 1 Jamaica, L. R. 13; Ani Waata *v.* Grice, 2 N. Zeal. L. R. 105, 117.] This time-honored rule is universally prevalent in this country. The doctrine of Doe *v.* Barnard is open to the further criticism that it is a distinct encouragement of private war as a substitute for legal proceedings. For C., the unsuccessful plaintiff, has only to eject A. by force in order to turn the tables upon him. Once in possession, he could defeat a new ejectment brought by A., in the same way that he himself had been rebuffed; that is, by setting up the superior right of B.'s heir. Fortunately Doe *v.* Barnard has been overruled, in effect, by Asher *v.* Whitlock, L. R. 1 Q. B. 1. The suggestion of Mellor, J., in the latter case, although adopted by Mr. Pollock (Poll. & Wr., Poss. 97, 99), that the former case may be supported on the ground that the superior right

must be deemed erroneous. The laches of the original owner, who remains continuously dispossessed throughout the statutory period, is the same, and should be attended with the same consequences to him, whether the adverse possession be held continuously by one or several persons, and whether subsequent possessors do or do not stand in privity with their predecessors. If, indeed, the adverse possession is not continuous, if, for instance, B., after disseising A., abandons the land, leaving the possession vacant, and C. subsequently enters without right upon this vacant possession, he cannot, of course, tack his time to B.'s.[1] Upon B.'s abandonment of the land the disseisin comes to an end. In legal contemplation, A.'s possession revives.[2] Having the right to possess, and no one else having actual possession, he is in a position analogous to that of an heir, or conusee of a fine before entry, and like them has a seisin in law. C.'s disseisin has, therefore, the same effect as if A. had never been disseised by B., and A.'s right of entry or action must continue until C. himself, or C. and his successors, have held adversely for twenty years. If the distinction here suggested between successive disseisins with continuous adverse possession, and successive disseisins without continuous adverse possession, had been kept in mind, a different result, it is believed, would have been reached in the American cases.[3]

If the conclusions here advocated are true in regard to land, they would seem to be equally valid where there is a continuous adverse possession of chattels by successive hold-

of B.'s heir was disclosed by the plaintiff's evidence, will hardly command approval. If an outstanding superior right of a third person is a relevant fact, it must be competent for the defendant to prove it; if it is irrelevant, its disclosure by the plaintiff's evidence must be harmless. [Doe *v.* Barnard may be regarded as thoroughly discredited by Perry *v.* Clissold, [1907] A. C. 73, 79-80.]

[1] Brandt *v.* Ogden, 1 Johns. 156; Malloy *v.* Bruden, 86 N. C. 251; Taylor *v.* Burnside, 1 Grat. 165. See, also, Brown *v.* Hanauer, 48 Ark. 277.

[2] Agency Co. *v.* Short, 13 App. Cas. 793; [Solling *v.* Broughton, [1893] A. C. 556, 561; Louisville Co. *v.* Philyan, 88 Ala. 264, 268; Downing *v.* Magee, 153 Ill. 330, 335; Wishart *v.* McKnight, 178 Mass. 356, 360; Cunningham *v.* Patton, 6 Barr, 355, 358, 359; Jarrett *v.* Stevens, 36 W. Va. 445, 450].

[3] It is a significant fact that in most of these cases Brandt *v.* Ogden, 1 Johns. 156, a case where the adverse possession was not continuous, was cited as a decision in point.

ers, although there is no privity between them. But no decisions have been discovered upon this point.[1]

(5.) *By judgment.* One who has been wrongfully dispossessed of a chattel has the option of suing the wrong-doer in Replevin, Detinue, Trover, or Trespass. A judgment in Replevin enables him to keep the chattels already replevied and delivered to him by the sheriff, and a judgment in Detinue establishes his right to recover the chattel *in specie*,[2] or, that being impracticable, its value. A judgment in Trespass or Trover, on the other hand, is for the recovery of the value only, as damages. Inasmuch as a defendant ought not to be twice vexed for a single wrong, a judgment in any one of these forms of action is not only a merger of the right to resort to that one, but is also a bar against the others.[3] Accordingly, a judgment in Trespass or Trover against a sole wrong-doer who, at the time of judgment recovered, is still in possession of the chattel operates like the statute of limitations, and annihilates the dispossessed owner's right to recover the chattel. The converter's possession being thus set free from adverse claims, changes into ownership.[4]

[1] In Norment *v.* Smith, 1 Humph. 46; Moffatt *v.* Buchanan, 11 Humph. 369; Wells *v.* Ragland, 1 Swan. 501; Hobbs *v.* Ballard, 5 Sneed, 395, there was in fact a privity; but the court thought otherwise, and accordingly disallowed tacking, as the same court denies the right to tack in the case of land if there is no privity.

[2] *Ex parte* Drake, 5 Ch. Div. 866; *Re* Scarth, 10 Ch. 234; Eberle Co. *v.* Jones, 18 Q. B. Div. 459; Sharpe *v.* Gray, 5 B. Mon. 4; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*).

[3] Lacon *v.* Barnard, Cro. Car. 35; Put *v.* Rawsterne, T. Ray. 472, 2 Show. 211 (*semble*); Hitchin *v.* Campbell, 2 W. Bl. 827; Lovejoy *v.* Wallace, 3 Wall. 1, 16 (*semble*); Barb *v.* Fish, 8 Black, 481; Rembert *v.* Hally, 10 Humph. 513. Serjeant Manning's Note, 6 M. & G. 160, n. a; Daniel *v.* Holland, 4 J. J. Marsh, 18, 26; Woolley *v.* Carter, 2 Halst. 85; Outcalt *v.* Durling, 1 Dutch. 443; Dietz *v.* Field, (N. Y. Ap. Div. 1896) 41 N. Y. S. 1087 (but see Union Co. *v.* Schiff, 78 Fed. 216, 86 Fed. 1023). Similarly, if the converted chattel has been sold, the owner, by recovering a judgment in *assumpsit*, extinguishes all his other remedies against the converter. Smith *v.* Baker, L. R. 8 C. P. 350 (*semble*); Bradley *v.* Brigham, 149 Mass. 141, 144-5; Boots *v.* Ferguson, 46 Hun, 129; Wright *v.* Ritterman, 4 Rob. 704.

[4] The chattel may therefore be taken on execution by a creditor of the converter. Rogers *v.* Moore, Rice, 60; Norrill *v.* Corley, 2 Rich. Eq. 288, n. (*a*); Foreman *v.* Neilson, 2 Rich. Eq. 287. See, also, Morris *v.* Beckley, 2 Mill, C. R. 227. [But compare Bush *v.* Bush, 1 Strob. Eq. 377.] A purchaser from a converter after judgment should take a perfect title. Goff *v.* Craven, 34 Hun, 150, *contra*, would seem to be a

If the change of possession is before judgment, there is a difference. Let us suppose, for instance, that B. converts the chattel of A., and, before judgment recovered against him in Trespass or Trover, sells it to C., or is in turn dispossessed by C. C., the new possessor, will hold the chattel, as B. held it, subject to A.'s right to recover it. The change of possession simply enlarges the scope of A.'s remedies; for his new rights against C. do not destroy his old right to sue B. in Trespass or Trover. Nor will an unsatisfied judgment against B. in either of these actions affect his right to recover the chattel from C.[1] [Or the proceeds of its sale in an action of assumpsit.[2]] It is no longer a question of double vexation to one defendant for a single wrong. Not until the judgment against B. is satisfied can C. use it as a bar to an action against himself. A different principle then comes into play, namely, that no one should receive double compensation for a single injury.[3]

Another case can be put where the dispossessed owner has concurrent rights against two or more persons. B. and C. may have jointly dispossessed A., instead of being successive holders of the converted chattel. Under these circumstances A. may proceed against B. and C. jointly or severally. If he obtain a joint judgment in Trespass or Trover, all his rights against both are merged therein, and

hasty decision. [If, after a judgment against a converter, but before its satisfaction, the dispossessed owner retakes the chattel, the converter, upon satisfying the judgment may maintain trover against the former owner. Smith *v.* Smith, 51 N. H. 571. This decision as well as that in Hepburn *v.* Sewell, 5 Har. & J. 211 was based upon the doctrine of relation, by which the converter's title, after satisfaction of the judgment, was made to relate back to the date of his conversion. The decision seems to be correct, but the doctrine of relation seems far fetched and has been deservedly criticised by Holmes J. in Miller *v.* Hyde, 161 Mass. 472, 481.]

[1] Matthews *v.* Menedger, 2 McL. 145; Spivey *v.* Morris, 18 Ala. 254; Dow *v.* King, 52 Ark. 282; Atwater *v.* Tupper, 45 Conn. 144; Sharp *v.* Gray, 5 B. Mon. 4; Osterhout *v.* Roberts, 8 Cow. 43; [Ledbetter *v.* Embree (Ind. 1895) 40 N. E. R. 928]. But see *contra,* Marsh *v.* Pier, 4 Rawle, 273, 286 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103, 106 (*semble*); Wilburn *v.* Bogan, 1 Speer, 179.

Similarly, an unsatisfied judgment against C. is no bar to a subsequent action against B. McGee *v.* Overby, 12 Ark. 164; Hopkins *v.* Hersey, 20 Me. 449; Bradley *v.* Brigham, 149 Mass. 141, 144-5. But see *contra,* Murrell *v.* Johnson, 1 Hen. & M. 449.

[2] Morris *v.* Robinson, 2 B. & C. 196.

[3] Cooper *v.* Shepherd, 3 C. B. 266.

his title to the chattel is extinguished. But if he obtain a separate judgment against one, he may still bring Replevin or Detinue against the other to recover the chattel, or Trespass or Trover for its value; for the latter cannot invoke the maxim, *nemo bis vexari debet pro eadem causa.*[1] Not until the judgment against the one is satisfied can it be used as a bar in an action against the other. The controversy whether the title to a converted chattel vests in a defendant by a simple judgment, or only after the satisfaction of the judgment, is, therefore, but another battle of the knights over the gold and silver shield. Under some circumstances the title changes by the judgment alone; in other cases satisfaction is necessary to produce that result.[2]

III

INALIENABILITY OF CHOSES IN ACTION

The rule that a *chose* in action is not assignable was a rule of the widest application. A creditor could not assign

[1] Lovejoy *v.* Murray, 3 Wall. 1; Elliot *v.* Porter, 5 Dana, 299; Elliott *v.* Hayden, 104 Mass. 180; Floyd *v.* Brown, 1 Rawle, 121 (*semble*); Fox *v.* Northern Liberties, 3 W. & S. 103 (*semble*); Sanderson *v.* Caldwell, 2 Aik. 195; [Sessions *v.* Johnson, 95 U. S. 347, 349; Birdsell *v.* Shaliol, 112 U. S. 485, 489; Knight *v.* Nelson, 117 Mass. 488; Miller *v.* Hyde, 161 Mass. 472; Tolman *v.* Waite, 119 Mich. 341; Hyde *v.* Noble, 13 N. H. 494; Osterhout *v.* Roberts, 8 Cow. 43; Russell *v.* McCall, 141 N. Y. 437; Turner *v.* Brook, 6 Heisk. 50].

But see *contra,* Brown *v.* Wootton, Yelv. 67, Cro. Jac. 73; Adams *v.* Broughton, Andr. 18; Buckland *v.* Johnson, 15 C. V. 145; Hunt *v.* Bates, 7 R. I. 217; [Edevain *v.* Cohen, 43 Ch. Div. 187 (*semble*); Merrick's Est. 5 W. & S. 9, 17; Hyde *v.* Kiehl, 183 Pa. 414, 429; Parmenter *v.* Barstow, 21 R. I. 410 (*semble*); Petticolas *v.* Richmond, 95 Va. 456 (*semble*)]. In Brinsmead *v.* Harrison, L. R. 6 C. P. 584, L. R. 7 C. P. 547, one of the joint converters pleaded, to a count in Detinue, a prior judgment against his companion. The plaintiff now assigned a detention subsequent to the joint taking. The court, with some reluctance, held the plea good, but also supported the replication, thus neutralizing one error by the commission of another, and so bringing about the same result as the American cases. The fallacy of the notion that the detention of a chattel by the wrongful taker is a fresh tort, was exposed, curiously enough, by the same court in an earlier case in the same volume: Wilkinson *v.* Verity, L. R. 6 C. P. 206. Such a notion, as there pointed out, would virtually repeal the statute of limitations. See Philpott *v.* Kelley, 3 A. & E. 106.

[2] The writer has discovered a further illustration, which should be added to those given in a preceding number of this Review, in support of the principle that a wrongful possessor acquires title whenever the injured owner's right of action is barred. If a disseisee levied a fine,

his debt. A reversioner could not convey his reversion, nor a remainder-man his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res* or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.

A right of action for the recovery of land or chattels, or of a debt which, like land or chattels, was regarded as a specific *res*, did, indeed, descend to one's representative in the case of death. But this was hardly a departure from the rule, since the representative was looked upon as a continuation of the *persona* of the deceased.[1]

There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a *chose* in action. So, too, a reversion or a remainder was transferable by fine in the king's court,[2] or by a customary devise, which, when recorded in the local court, operated like a fine.[3] Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced by a transferee. If, for instance, one granted an annuity to A. and his as-

nothing passed to the conusee, but the fine barred the conusor's right. The disseisor, therefore, gained an absolute title. 2 Prest. Abs. 206.

[1] The ancient appeals of battery, mayhem, imprisonment, robbery, and larceny were actions for vengeance, and from their strictly personal character naturally died with the party injured. Trespass for a personal injury, and *de bonis asportatis*, and *quare clausum fregit*, being for the recovery of damages only, also came within the maxim *actio personalis moritur cum persona*. By St. 4 Edw. III., c. 7, an executor was allowed to recover damages for goods taken from the testator by a trespass. And such has been the elasticity of this statute that under it actions for a conversion, for a false return, for infringement of a trademark, for slander of title, for deceit, — in short, actions for any tort whose immediate effect is an injury to or a diminution of another's property, have been held to survive. But not actions for torts which directly affect the person or reputation, and only indirectly cause a loss of property. In the United States the argument that a wrong-doer ought not to profit by the death of his victim, has led to legislation greatly increasing the actions that survive.

[2] Attornment was necessary before the conusee could distrain or bring an action against the tenant for services or rent. But the tenant could be compelled to attorn by the writs *Quid juris clamat*, and *Per quæ servitia*. 2 Nich. Britt. 46-48.

[3] Y. B. 19 H. VI. 24-47; Co. Lit. 322 a.

signs, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A. and his assigns, the assignee was allowed to bring an action in his own name against the grantor,[1] covenantor,[2] and warrantor,[3] respectively.

The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that this rule had its origin in the aversion of the "sages and founders of our law" to the "multiplying of contentions and suits"[4] shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence.[5] The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law.

A right of action in one person implies a corresponding duty in another to perform an agreement or to make reparation for a tort. That is to say, a *chose* in action always presupposes a personal relation between two individuals. But a personal relation in the very nature of things cannot be assigned. Even a relation between a person and a physical thing in his possession, as already stated,[6] cannot be

[1] 1 Nich. Britt. 269-270; Maund's Case, 7 Rep. 28 b; Co. Lit. 144, Butler's note [236]; Scott *v.* Lunt, 7 Pet. 596.

[2] (1233) 2 Bract. Note Book, pl. 804; Y. B. 21 Edw. I. 137; Old Nat. Br., Rast. L. Tr. 67; Fitz. Nat. Br. 145.

[3] (1233) 2 Bract. Note Book, pl. 804; Bract. f. 37 b, 381 b, 390, 391; 1 Nich. Britt. 255-256; (1285) Fitz. Ab. Garr. 93. These citations from Bracton are hardly reconcilable with the interpretation which Mr. Justice Holmes has given in "The Common Law" (pp. 373-4) of an obscure and possibly corrupt passage in Bracton, f. 17 b. In view of Professor Brunner's investigations (*Zeitschrift f. d. gesammte Handelsrecht*, Vol. 22, p. 59, and Vol. 23, p. 225), the distinguished judge would doubtless be among the first to correct his remark on p. 374: "By mentioning assigns the first grantor did not offer a covenant to any person who would thereafter purchase the land."

[4] Lampet's Case, 10 Rep. 48 a.

[5] "But in regard to *choses* in action, as the same doctrine has been adopted in every other state of Europe, it may be doubted whether the reason, which has been the foundation of the rule everywhere else, was not also the reason for its introduction in this country; namely, that the credit being a personal right of the creditor, the debtor being obliged toward that person could not by a transfer of the credit, which was not an act of his, become obliged towards another." 2 Spence, Eq. Jur. 850. See also Pollock, Contracts (5 ed.), 206; Holmes, Common Law, 340-341; Maitland, 2 L. Q. Rev. 495.

[6] *Supra*, 315.

transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*. But where one has a mere right against another, there is nothing that is capable of transfer. The duty of B. to A., whether arising *ex contractu* or *ex delicto*, may of course be extinguished and replaced by a new and coextensive duty of B. to C. But this substitution of duties can be accomplished only in two ways: either by the consent of B., or, without his consent, by an act of sovereignty. The exceptions already mentioned of assignments by or to the king, and conveyances of remainders and reversions in the King's Court, are illustrations of the exercise of sovereign power. Further illustrations are found in the bankruptcy laws which enable the assignee to realize the bankrupt's *choses* in action,[1] and in the Statute 4 and 5 Anne, c. 16, which abolished the necessity of attornment.

When the substitution of duties is by consent, the consent may be given either after the duty arises or contemporaneously with its creation. In the former case the substitution is known as a novation, unless the duty relates to land in the possession of a tenant, in which case it is called an attornment. A consent contemporaneous with the creation of the duty is given whenever an obligation is by its terms made to run in favor of the obligee and his assigns, as in the case of annuities, covenants, and warranties before mentioned, or to order or bearer, as in the case of bills and notes and other negotiable securities. Here, too, on the occasion of each successive transfer, there is a novation by virtue of the obligor's consent given in advance; the duty to the transferror is extinguished and a new duty is created in favor of the transferee.

The practice of attornment prevailed from time immemorial, but was confined to the transfer of reversions and remainders. Novation, although now a familiar doctrine, was, if we except the case of obligations running to the

[1] In general, whatever would survive to an executor passes to the assignee of a bankrupt.

obligee and his assigns, altogether unknown before the days of *assumpsit* upon mutual promises.[1] The field for the substitution of duties by consent was therefore extremely limited, and in the great majority of cases a creditor would have found it impossible to give another the benefit of his claim had not the ingenuity of our ancestors devised another expedient, namely, the letter of attorney. By such a letter, the owner of a claim appointed the intended transferee as his attorney, with power to enforce the claim in the appointor's name, but to retain whatever he might recover for his own benefit. In this way the practical advantage of a transfer was secured without any sacrifice of the principle of the inalienability of *choses* in action.[2]

Indeed, so effectual was the power of attorney as a transfer, that, during a considerable interval, it was thought unduly to stimulate litigation, and therefore to fall within the statutory prohibition of maintenance, unless the power was executed for the benefit of a creditor of the transferror. Powers executed for the benefit of a purchaser or donee were treated as void from the beginning of the fifteenth century, if not earlier, till near the close of the seventeenth century.[3]

[1] The *rationale* of this doctrine is as follows: The so-called assignee of a claim is in reality an attorney with a power to sue for his own use. Being thus *dominus* of the *chose* in action, he enters into a bilateral contract with the obligor, promising the latter never to enforce his claim in return for the obligor's promise to pay him what is due thereon. This promise of perpetual forbearance operates as an equitable release of the old claim, and also as a consideration for the obligor's new promise.

[2] In 1 Lilly's Ab. 125, it is said: "A statute merchant or staple, or bond, etc., can not be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R." See also Deering *v.* Carrington, 1 Lilly, Ab. 124; Shep. Touchst. (6 ed.) 240; 2 Blackst. Com. 442; Leake, Cont. (2 ed.) 1183; Gerard *v.* Laws, L. R. 2 C. P. 308, 309, per Willes, J. These letters of attorney for the attorney's own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiquity. (1309) Riley, Memorials of London, 68. "Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in my own proper person." See also West, Symbol. § 521.

[3] Y. B. 9 H. VI. 64-17; Y. B. 34 H. VI. 30-15; Y. B. 37 H. VI. 13-3; Y. B. 15 H. VII. 2-3; Penson *v.* Hickbed (1588), 4 Leon. 99, Cro. Eliz.

The objection of maintenance at length gave way before the modern commercial spirit, and for the last two centuries debts have been as freely transferable by power of attorney as any other property.[1]

By statute, in many jurisdictions, the assignee may even sue in his own name. But it is important to bear in mind that the assignee under the statute still proceeds in a certain sense as the representative of the assignor. The statute of itself works no novation. It introduces only a change of procedure.[2] A release by the assignor to the debtor, ignorant of the assignment, extinguishes all liability of the debtor to any one.

So, if the assignor should wrongfully make a second assignment, and the second assignee should collect the debt, he would keep the money, and the first assignee would get nothing.[3]

170; South *v.* March (1590), 3 Leon. 234; Harvey *v.* Bateman (1600), Noy, 52; Barrow *v.* Gray (1600), Cro. Eliz. 551; Loder *v.* Chesleyn (1665), 1 Sid. 212; Note (1667-1772), Freem. C. C. 145. See also Pollock, Cont. (5 ed.) 701; 1 Harv. L. Rev. 6, n. 2.

The doctrine of maintenance was pushed so far that it came to be regarded as the real reason for the inalienability of *choses* in action, and the notion became current that no contracts were assignable, not even covenants or policies of insurance and the like, although expressly payable to the obligee and his assigns. Even bills and notes were thought to derive their assignability solely from the custom of merchants. Warranties being obviously not open to the objection of maintenance continued assignable, and so did annuities, although not without question. Perkins, Convey, § 101.

[1] Formerly an express power of attorney was indispensable (Mallory *v.* Lane, Cro. Jac. 342), the notion of an implied power being as much beyond the conception of lawyers three centuries ago as the analogous idea of an implied promise. 2 Harv. L. Rev. 52, 58. To-day, of course, the power will be implied from circumstantial evidence. [Formerly a deed could not be delivered in escrow without express words to that effect. Bowker *v.* Burdekin, 11 M. & W. 128, 147.]

[2] Accordingly an assignment in New York, where, by statute, actions must be brought by the real party in interest, did not enable the assignee to sue in Massachusetts, when the old rule that an assignee must sue in the assignor's name prevailed. Leach *v.* Greene, 116 Mass. 534; Glenn *v.* Busey, 5 Mack. 733. If the statute truly effected a change of title, the assignee, like the indorsee of a bill, could sue in his own name anywhere.

[3] The assignee of an equitable *chose* in action, *e. g.*, a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable incumbrance. Newman *v.* Newman, 28 Ch. D. 674. So, if a *cestui que trust* should assign his

We are now in a position to consider upon principle to what extent and in what mode a disseisee's interest in land or chattels may be transferred. The disseisee, by reason of the disseisor's tort, has a right to recover the *res* from the latter by self-redress or by action. This relation between the two, as we have seen, cannot be specifically transferred to another. There is, of course, no question of novation in such a case. But the mode of transfer which proved so effectual in the case of rights *ex contractu*, is equally applicable to claims arising *ex delicto*. The disseisee has only to constitute the intended grantee his attorney with power to recover the land or chattel, and to keep for his own benefit the *res* when recovered. There is an instance of such a grant as old as the time of Richard I.: "*G. filius G. ponit loco suo J. versus Gil. . . . de placito XL. acrarum terræ in H. ad lucrandum vel perdendum et* CONCEDIT EI TOTUM JUS SUUM *quod habet in predicta terra.*" [1]

trust first to A. and then to B., and B. should, in good faith, obtain a conveyance of the legal title from the trustee, he could hold it against A. What is true of the equitable trust is equally true of the analogous legal bailment. By judicial legislation the purchaser from a bailor is allowed to proceed in his own name against the bailee. But a bailee who, for value and in ignorance of the bailor's sale of his interest, receives a release from the latter, may keep the chattel. [If a bailee, in ignorance of a sale by the bailor, should deliver the goods to the bailor or to some person designated by the bailor, he could not be charged by the bailor's vendee. He would simply have performed his contract according to its tenor. Saxeby *v.* Wynne, 3 Stark. Ev. (3d ed.) 1159; Glynn *v.* E. I. Co. 7 App. Cas. 591; Jones *v.* Hodgkins, 61 Me. 480; Woods *v.* McGee, 7 Oh. 127 (as explained in Newhall *v.* Langdon, 39 Oh. St. 87, 92; McGee *v.* French, 49 S. Ca. 452 (*semble*);] and if a bailor should sell his interest successively to A. and B., and B. should obtain possession from the bailee, A. could not recover the chattel from B. Upon principle and by the old precedents the bailor's interest is no more transferable than that of a creditor. Y. B. 22 Ed. IV. 10-29; Wood *v.* Foster, 1 Leon. 42, 43, pl. 54; Marvyn *v.* Lyds, Dy. 90 b, pl. 6; [Rich *v.* Aldred 6 Mod. 216]; 2 Blackst. Com. 453. As late as 1844, that great master of the common law, Mr. Baron Parke, ruled that a purchaser from a pledgor could not maintain an action in his own name against the pledgee. The court *in banc* reversed this ruling. Franklin *v.* Neate, 13 M. & W. 481. [See also Goodman *v.* Boycott, 2 B. & S. 1; Bristol Bank *v.* Midland Co. [1891] 2 Q. B. 653.] The innovation has been followed in this country. Carpenter *v.* Hale, 8 Gray, 157; Hubbard *v.* Bliss, 12 All. 590; Meyers *v.* Briggs, 11 R. I. 180; [Jack *v.* Eagles, 2 All. (N. B.) 95].

[1] (1134) 1 Rot. Cur. Reg. 42, cited by Brunner, 1 Zeitschrift für Vergleichende Rechtswissenschaft, 367. See also "A Boke of Presidents," fol. 86, b: "Noveritis me P. loco meo posuisse T. meum verum et legitimum atturnatum ad prosequendum . . . vice et nomine meo pro

The doctrine of maintenance which so long hampered the assignment of contractual rights proved an even more persistent obstacle to the transfer of rights to recover land or chattels. Indeed, in the case of land it was an insuperable obstacle in England until 1845; for up to that time the Statute 32 Henry VIII. c. 16, expressly nullified all grants by one disseised. In this country, however, the right of the grantee of a disseisee to bring a real action in the name of his grantor has, during the present century, been generally recognized.[1]

It is believed that in England, at the present day, one who is dispossessed of his chattels may so far transfer his interest as to enable the assignee to bring an action to recover the chattel or its value in the name of the assignor. But no decision has been found upon the point. In the United States the right of the transferee to sue in the transferror's name,[2] or, in jurisdictions where the real party in interest must be plaintiff, in his own name,[3] would be universally conceded.

We have thus far assumed that the dispossessed owner

omnibus illis terris . . . vocatis W. . . . quæ mihi . . . descendebant et quæ in presenti a me injuste detinentur. Necnon in dictas terras . . vice et nomine meo ad intrandum ac plenam . . . possessionem et seisinam . . . capiendum . . . et super hujusmodi possessione sic capta et habita dictas terras . . . AD USUM DICTI T. custodiendum gubernandum occupandum et ministrandum."

[1] Steeple *v.* Downing, 60 Ind. 478; Vail *v.* Lindsay, 67 Ind. 528; Wade *v.* Lindsey, 6 Met. 407; Cleaveland *v.* Flagg, 4 Cush. 76; Farnum *v.* Peterson, 111 Mass. 148; McMahan *v.* Bowe, 114 Mass. 140; Rawson *v.* Putnam, 128 Mass. 552, 553; Stockton *v.* Williams, 1 Doug. (Mich.) 546; Betsey *v.* Torrance, 34 Miss. 132; Hamilton *v.* Wright, 37 N. Y. 502; Wilson *v.* Nance, 11 Humph. 189, 191; Edwards *v.* Roys, 18 Vt. 473; University *v.* Joslyn, 21 Vt. 61; Edwards *v.* Parkhurst, 21 Vt. 472; Park *v.* Pratt, 38 Vt. 545; [Paton *v.* Robinson, (Conn. 1909) 71 Atl. R. 730; Brinley *v.* Whiting, 5 Pick. 348; Livingston *v.* Proseus, 2 Hill, 526; Dever *v.* Hagerty, 169 N. Y. 481; Galbraith *v.* Payne, 12 N. Dak. 164; Ten Eyck *v.* Witbeck, 55 N. Y. Ap. Div. 165, affirmed 170 N. Y. 564; Saranac Co. *v.* Roberts, 125 N. Y. Ap. Div. 333, 341; Hasbrouck *v.* Bunce, 62 N. Y. 475].

[2] Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Holly *v.* Huggeford, 8 Pick. 73; Boynton *v.* Willard, 10 Pick. 166; Clark *v.* Wilson, 103 Mass. 219, 222; Jordan *v.* Gillen, 44 N. H. 424; North *v.* Turner, 9 S. & R. 244.

[3] Lazard *v.* Wheeler, 22 Cal. 139; Final *v.* Backus, 18 Mich. 218; Brady *v.* Whitney, 24 Mich. 154; Grant *v.* Smith, 26 Mich. 201; Smith *v.* Kennett, 18 Mo. 154; Doering *v.* Kenamore, 86 Mo. 588; McKee *v.* Judd, 12 N. Y. 622; Robinson *v.* Weeks, 6 How. Pr. 161; Butler *v.* N. Y. Co., 22 Barb. 110; McKeage *v.* Hanover Co., 81 N. Y. 38; Birdsall *v.* Davenport, 43 Hun, 552; [Lincoln Co. *v.* Allen, 82 Fed. 148; Howe *v.* Johnson, 117 Cal. 37; Lawrence *v.* Wilson, 64 N. Y. Ap. Div. 562].

has nothing to transfer but a right of action or recaption; that when he is called owner, nothing more is meant than that he has the chief one of the two elements of perfect ownership, namely, the right of possession, and is, therefore, potentially owner. This assumption is conceived to be well founded, and is supported by abundant authority.[1] There are, however, a few decisions and *dicta* to the contrary.[2] These adverse opinions all go back to a *dictum* of Mr. Justice Story: "I know of no principle of law that establishes that a sale of personal goods is invalid because they are not in the possession of the rightful owner, but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title to every person, not holding the same under a *bona fide* title for a valuable consideration without notice; and *a fortiori* against the wrong-doer."[3] Had this unfortunate *dictum* proceeded from a less distinguished source, it probably would not have had its present following. It may be said of it that it involves a *petitio principi*, assuming without proof, and in contradiction of all precedent, that the dispossessed owner really has something more than a right of action. What this something is has never been defined, and, it is submitted, for the reason that non-existent things are incapable of definition.

Let us test this *dictum*, however, by some of its practical consequences. We will suppose that after the sale the con-

[1] In addition to the early English authorities cited *supra*, pp. 34-35, see Scott *v.* McAlpine, 6 Up. Can. C. P. 302; Murphy *v.* Dunham, 38 Fed. Rep. 503, 506; Goodwyn *v.* Lloyd, 8 Port. 237; Brown *v.* Lipscomb, 9 Port. 472; Dunklin *v.* Williams, 5 Ala. 199; Huddleston *v.* Huey, 73 Ala. 215; Foy *v.* Cochran, 88 Ala. 353; McGoon *v.* Ankeny, 11 Ill. 558; O'Keefe *v.* Kellogg, 15 Ill. 347; Taylor *v.* Turner, 87 Ill. 296 (*semble*); Ericson *v.* Lyon, 26 Ill. Ap. 17; Stogdel *v.* Fugate, 2 A. K. Marsh. 136; Young *v.* Ferguson, 1 Litt. 298; Davis *v.* Herndon, 39 Miss. 484; Warren *v.* St. Louis Co., 74 Mo. 521; Doering *v.* Kenamore, 86 Mo. 588; Gardner *v.* Adams, 12 Wend. 297; Blount *v.* Mitchell, 1 Tayl. (N. C.) 130; Morgan *v.* Bradley, 3 Hawks, 159; Stedman *v.* Riddick, 4 Hawks, 29; Overton *v.* Williston, 31 Pa. 155.

This note and the following are a revision of note 5, *supra*, p. 35.

[2] Brig Sarah Ann, 2 Sumn. 206, 211; Tome *v.* Dubois, 6 Wall. 548; Cartland *v.* Morrison, 32 Me. 190; Webber *v.* Davis, 44 Me. 147; Clark *v.* Wilson, 103 Mass. 219, 222-3 (*semble*); Dahill *v.* Booker, 140 Mass. 308, 311 (*semble*); Serat *v.* Utica Co., 102 N. Y. 681 (*semble*); Kimbro *v.* Hamilton, 2 Swan, 190.

[3] Brig Sarah Ann, 2 Sumn. 206, 211.

verter, in ignorance thereof, makes full compensation to the vendor for the conversion, and receives from him a release. Will it be maintained that the converter cannot hold the chattel against the vendee? And yet if the title passed to the vendee by the sale, that title cannot be affected by a subsequent release by one who has no title. Again, we may assume that the vendor wrongfully makes a second sale, and that the second vendee, being still in ignorance of the first sale, recovers the chattel or its value from the converter. Must the second vendee surrender what he recovers to the first vendee? Surely not. But he must if the *dictum* under discussion is sound. Thirdly, if the title passed to the vendee, what becomes of the vendor's right of action? Surely he cannot recover the value of the chattel from the converter after he has sold it to another. But it may be urged he will be entitled to nominal damages only. Be it so. Suppose, then, that immediately after the sale the chattel is accidentally destroyed. The vendor will recover his nominal damages, the vendee will get nothing, and the converter will go practically scot free. It is possible to say, however, that the sale passes not only the title, but also the right to sue in the vendor's name for the conversion. But this hypothesis may work an injustice to the converter. If not sued for six years his title will be perfect. Suppose the sale to occur near the end of the period of limitation, and that the vendee can prove a conversion subsequent to the sale, as by a demand and refusal, the statute would run for another six years, which could not have happened in favor of the vendor if there had been no sale. In other words, the rule, *Nemo dare potest quod non habet*, would be violated.[1]

All these unsatisfactory results are avoided by the adoption of the opposite view, supported alike by precedent and general reasoning, that a right of action is the sum and substance of the interest of a dispossessed owner of a chattel. On this theory the sale of the disseisee's right of action has the same operation as the assignment of a debt. The vendee stands in the place of the grantor, but does not displace him. He cannot accordingly extend the statute of limita-

[1] See Overton *v.* Williston, 31 Pa. 155, 160.

tions to the detriment of the converter. A release by the vendor for value to the converter who is ignorant of the sale, although wrongful, extinguishes all right to recover possession from the latter, and so makes him complete owner of the chattel. And, finally, a second purchaser from the dispossessed owner, who in good faith gets the chattel from the converter, may keep it. If, furthermore, statutes existed in all jurisdictions enabling the purchaser from a dispossessed owner of a chattel to sue for its recovery in his own name, there would be a complete harmony between the requirements of legal principle and commercial convenience.

In conclusion, then, the ancient doctrine of disseisin of land and chattels was not an accident of English legal history, but a rule of universal law. Brian's *dictum*, that the wrongful possessor had the property and the dispossessed owner only the right of property, rightly understood, is not a curiosity for the legal antiquarian, but a working principle for the determination of controversies for all time.

68. THE MYSTERY OF SEISIN[1]

By Frederic William Maitland[2]

ANY one who came to the study of Coke upon Littleton with some store of modern legal ideas but no knowledge of English Real Property Law would, it may be guessed, at some stage or another in his course find himself saying words such as these:—'Evidently the main clue to this elaborate labyrinth is the notion of seisin. But what precisely this seisin is I cannot tell. Ownership I know and possession I know, but this *tertium quid*, this seisin, eludes me. On the one hand when Coke has to explain what is meant by the word he can only say[3] that it signifies possession, with this qualification however that it is not to be used of movables and that one who claims no more than a chattel interest in land can not be seised though he may be possessed. But on the other hand if I turn from definitions to rules then certainly seisin does look very like ownership, insomuch that the ownership of land when not united with the seisin seems no true ownership.'

The perplexities of this imaginary student would at first be rather increased than diminished if he convinced himself, as I have convinced myself and tried to convince others, that the further back we trace our legal history the more perfectly equivalent do the two words *seisin* and *possession* become, that it is the fifteenth century before English lawyers have ceased to speak and to plead about the seisin (thereby being meant the possession) of chattels.[4] Certainly as we

[1] This Essay was originally published in the Law Quarterly Review, 1886, vol. II, pp. 481-496.

[2] A biographical note of this author is prefixed to Essay No. 1, in Volume I of this Collection.

[3] Co. Lit. 17 a, 153 a, 200 b.

[4] Law Quarterly Review, July, 1885. *The Seisin of Chattels.* I am indebted to Mr. M. M. Bigelow, Mr. H. W. Elphinstone, and a learned critic in the Solicitors' Journal for several new examples, both very

make our way from the later to the older books we do not seem to be moving towards an age when there was some primeval confusion between possession and ownership. We find ourselves debarred from the hypothesis that within time of memory these two modern notions have been gradually extricated from a vague ambiguous *seisin* in which once they were blent. In Bracton's book the two ideas are as distinct from each other as they can possibly be. He is never tired of contrasting them. In season, and (as the printed book stands) out of season also, he insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite another. He can say with Ulpian, *Nihil commune habet possessio cum proprietate.*[1]

There are some perhaps who would have for the student's questionings a ready and brief answer, satisfactory to themselves if not to him. If, they would say, you are thinking of ownership and applying that notion to English land, you indeed disquiet yourself in vain; dismiss the idea; it is not known, never has been known, to our law; land in this country is not owned, it is holden, holden immediately or mediately of the king. The questioner might be silenced; I doubt he would be convinced. In the first place he might urge, and it seems to me with truth, that the theory of tenure, luminous as it may be in other directions, sheds no one ray of light on the strangest of the strange effects which seisin and want of seisin had in our old law. In the second place he might appeal to authority and remark that Coke, who presumably knew some little of tenures, speaks freely and without apology of the ownership and even the 'absolute ownership'[2] of land, while as to Bracton, who lived while feudalism was yet a great reality, for lands and for chattels he has the same words, to wit, *dominium* and *proprietas*.

early and very late, of the use of the word *seisin* in connection with chattels. (See Litt. sec. 177, also *Paule* v. *Moodie*, 2 Roll. Rep. 131.) But as to the usage of the thirteenth century, I have now, after having copied more than a thousand cases, no doubt whatever: the words *possideo, possessio* are extremely rare, but one can be seised of anything, even of a wife or of a husband. I have known a woman assert, in proof of her marriage, that she remained seised of her husband's body after his death.

[1] Bracton, f. 113, from Dig. 41. 2 (de acquir. vel amit. poss.) 12. § 1.

[2] Co. Lit. 369 a, 17 a, b.

But it may well be said, and this brings us to more profitable doctrine, that English law knew no true ownership of land because the rights of a landowner who was not seised fell far short of our modern conception of ownership. Deprive the tenant in fee simple of seisin, and he is left with a right of entry. Even now this would be the most technically correct description of his right. Until lately his right might undergo a still further degradation; from having been a right of entry it might be debased into a mere right of action.

Now it is to the nature of these rights, whether we call them ownership or no, or rather to one side of their nature, that I would here draw attention. To simplify matters as much as possible we may for the moment leave out of account all estates and interests less than fee simple. The question then becomes this, what is the nature of the rights given by our old law to a person who is lawfully entitled to be seised of land in fee simple when as a matter of fact some other person is seised? or (to use words which will not be misunderstood though they are not the proper words of art) what is the nature of the rights of an absolute owner when some stranger is in possession?

Such a student as I have imagined might well be prepared to find that possession by itself, or possession coupled with certain other elements such as good faith and colour of title, or possession continued for a certain period, would have certain legal effects, effects which would consist in protecting the possessor against mere trespassers, in entitling him to recover possession if ejected by a stranger, in depriving the true owner of any right to obtain possession save by recourse to the courts, in at last depriving that owner of all right whatever and conferring on the possessor a title good against all men. He might expect too that in a system rich in definite forms of action, some possessory some proprietary, the outcome of different ages, these effects would be very complicated; and certainly he would not be disappointed. He would, for example, find the ousted owner gradually losing his remedies one by one, first the remedy by self-help, then the possessory assizes, then the writs of entry, lastly

the very writ of right itself. He would here find much to puzzle him, for the rules as to the conversion of a right of entry into a right of action seem to us quaint and arbitrary. Still all these manifold and complex effects of possession and dispossession, seisin and want of seisin, are of a kind known and intelligible, partly due to formalities of procedure and statutory caprices, but tending in the main to protect the possessor in his possession and uphold the public peace against violent assertions of proprietary right; analogies may be found in other systems of law modern as well as ancient.

But this is far from all. Seisin has effects of a quite other kind. The owner who is not seised not only loses remedies one by one, but he seems hardly to have ownership, and this, not because all lands are held of the king, but because as regards such matters as the alienation, transmission, devolution of his rights he seems to be in a quite different position from that in which we should expect to find a person who, though he has not possession, has yet ownership. Let a few rules be repeated that were law until but a short while since. They are well known, but it may be worth while to put them together, for they make an instructive whole.

(1) Until the 1st of October 1845, a right of entry could not be alienated among the living.[1] In other words, the owner who is not seised has nothing to sell or to give away.

An explanation of this rule has been found in the law's dislike of maintenance. It may be given in the words of Sir James Mansfield: — 'Our ancestors got into very odd notions on these subjects, and were induced by particular causes to make estates grow out of wrongful acts. The reason was the prodigious jealousy which the law always had of permitting rights to be transferred from one man to another, lest the poorer should be harassed by rights being transferred to more powerful persons.'[2] This bit of rationalism is of respectable antiquity; it is certainly as old as Coke's day;[3] and true it is that at one time our laws did manifest a

[1] 8 & 9 Vict. c. 106, sec. 6.
[2] *Goodright* v. *Forrester*, 1 Taunt. 613.
[3] Co. Lit. 213 b; *Lampet's Case*, 10 Rep. 48 a.

great, but seemingly most reasonable,[1] jealousy of maintenance and champerty, of bracery and the buying of pretenced titles. But still the explanation seems insufficient. Its insufficiency will be best seen when we pass to some other rules. In passing, however, let us notice how deeply rooted in our old law this rule must be. We come upon it directly we ask the simplest question as to the means of transferring ownership. What is the one 'assurance,' the one means of passing ownership, known to the common law? Why, if we leave out of account litigious proceedings real or fictitious, it is the feoffment, and there must be livery of seisin, that is, delivery of possession. One cannot deliver possession to another when a third person is possessing; so a right of entry cannot but be inalienable. Or put it this way: our old law has an action which is thoroughly proprietary, which raises the question of most mere right, the writ of right, the only hope of one who cannot base his claim on a recent possession. Yet even in the writ of right the demandant must count upon his own seisin or on the seisin of some ancestor, and thence deduce a title by descent; he cannot count on the seisin of a donor or vendor, 'for the seisin of him of whom the demandant himself purchased the land availeth not.'[2] This is a rule which can be traced from Coke to Bracton,[3] a rule of procedure, be it granted, but a rule which shows plainly that he who has no seisin has nothing that he can give to another. But to this matter of alienation *inter vivos* we will return.

(2) Before the 1st of January 1838[4] a right of entry could not be devised by will. About devises of course we cannot expect much ancient common law. The question depended on the meaning of the statutes of 1540[5] and 1542;[6] but the manner in which these statutes were interpreted is worthy of note. Throughout the verb used of the person who is empowered to make a will is the verb *to have*. The

[1] Stubbs, Const. Hist. § 295.
[2] Co. Lit. 293 a.
[3] Bracton, f. 376.
[4] 1 Vic. cap. 26, sec. 3.
[5] 32 Hen. VIII, cap. 1.
[6] 34 Hen. VIII, cap. 5.

person who *has* any manors, lands, tenements or hereditaments may dispose of them by will. But though some modern judges did not much like the interpretation, still the old interpretation was that the disseised owner *has* not any land, tenement, or hereditament, and therefore has nothing to leave by his will.[1] A case from the year 1460 shows plainly that before the statutes a similar rule prevailed; to give validity to a devise under local custom it was essential that the testator should die seised, though it was doubted whether he need be seised when making the will.[2]

(3) Until the 1st of January 1834[3] *seisina fecit stipitem.* Now this when duly considered seems a very remarkable rule, for it comes to this, that a landowner who has never been in possession has no right that he can transmit to his heir, or in other words, that ownership is not inheritable. Such a person may be (to use a venerable simile) the passive 'conduit-pipe' through which a right will pass, but no one shall ever get the land by reason that he was this man's heir; a successful claimant must make himself heir to one who was seised. But what explanation have we for this? A fear of maintenance very obviously fails us, and as it seems to me feudalism must fail us also, unless we are to suppose a time when seisin meant not mere possession but possession given, or at least recognized, by the lord of the fee. But for imagining any such time we have no warrant. It seems law from the first that the rightful tenant can be disseised, though the lord be not privy to the disseisin, and that the disseisor will be seised whether the lord like it or no.

And to constitute a new stock of descent a very real possession was necessary. The requisite seisin was not a right which could descend from father to son; it was a pure matter of fact. Even though there was no adverse possessor, even though possession was vacant, the heir was not put into seisin by his ancestor's death; an entry, a real physical

[1] The cases are collected in Jarman on Wills, 4th ed., vol. 1, pp. 49, 50. Perhaps they leave open some questions which will never now be answered. But the main doctrine seems beyond dispute. See Co. 3 Rep. 35 a.

[2] Y. B. 39 Hen. VI. f. 18 (Mich. pl. 23).

[3] 3 & 4 Will. 4. c. 106; Co. Lit. 11 b.

entry, was necessary. We all know the old story of the man who was half inside half outside the window, and who was pulled out by the heels. It was certainly a nice problem whether he possessed *corpore* as well as *animo;* but at any rate on this depended the question whether he had been seised and could maintain the novel disseisin against those who extracted him.[1]

(4) The Dower Act of 1833[2] for the first time gave a widow dower of a right of entry; but for that statute the widow of one who has not been seised goes unendowed. It is true that in this case 'a seisin in law or a civil seisin' would answer the purpose of 'a seisin in deed.'[3] But this 'seisin in law' only existed when possession was in fact vacant. A man was seised neither in fact nor yet in law if some other person had obtained and was holding seisin. If such an one did not get seisin during the coverture his wife would get no dower.

Here it may be remarked that seisin did to some extent become a word with many meanings or rather shades of meaning. The seisin which is good enough for one purpose is insufficient for another. 'What shall be said a sufficient seisin' to give dower, to give curtesy, to constitute a stock of descent, to maintain a writ of right[4] — each of these questions has its own answer. But I believe that the variations are due (1) to the treatment of cases in which no one has corporeal possession of the lands, and (2) to the application of the idea of possession to subjects other than lands, namely, the incorporeal hereditaments, an application which must necessarily be difficult and may easily be capricious. No fictitious seisin in law was, so far as I am aware,[5] ever attributed to one who however good his title was clearly dispossessed, to one whose land was being withheld from him by a stranger to the title. And the 'seisin in law' may well set us thinking. When we hear that *A* is *B* in law we can

[1] 8 Ass. f. 17, pl. 27.
[2] 3 & 4 Will. 4. cap. 105.
[3] Co. Lit. 31 a.
[4] Co. Lit. 15 b, 29 a, 31 a, 181 a.
[5] It may be more to the point that Mr. Challis (Real Property, p. 182) has written to the same effect. See *Leach* v. *Jay*, 9 C. D. 42.

generally draw an inference about past history: — it has been found convenient to extend to *A* a rule which was once applied only to things which were *B* in deed and in truth; in short, there was a time when *A* was not *B* even in law. For a few but by no means all purposes we may say with the old French lawyers, 'le mort saisit le vif;' the seisin in law would, e. g. give dower, but it would not make a stock of descent.

(5) To give a husband curtesy seisin during the coverture was necessary. This rule has never yet been abolished, though it has been somewhat concealed from view both by Equity and by statutes.

So far we have been concerned with rules which are still generally known, and one of them, the rule about curtesy, has not yet become a matter for the antiquary. It now becomes desirable to glance at some obscurer topics. Since we are sometimes assured that in one way or another the strange effects of seisin and want of seisin are due to feudalism, we ought to ask how the rights of a lord were affected by the fact that 'the very tenant,' the true owner, was out of seisin and some other person in seisin.

Suppose tenant in fee simple is disseised and then dies without an heir, what can be plainer on feudal principles (feudal principles as understood in these last times) than that the land will escheat to the lord, that the lord will be able to recover the land from the disseisor or from any person who has come to the land through or under the disseisor? But such was not the law even in the last, even in the present century, and if it be law now, a point about which I had rather say nothing, this must be the result either of the statutes which have deprived feoffments and descents of their ancient efficacy or else of a convenient forgetfulness. In Coke's day it seems to have been settled that from the original disseisor the lord could obtain the land either by entry or by action (writ of escheat), provided that he had not accepted the disseisor as tenant. If however before the death of the disseisee the disseisor made a feoffment in fee, or died seised leaving an heir, there was no escheat at all, 'because the lord had a tenant in by title;' he had, that is, a tenant

who could not personally be charged with any tort. Of a right of action, as distinguished from a right of entry, there was no escheat; 'such right for which the party had no remedy but by action only to recover the land is a thing which consists only in privity, and which cannot escheat nor be forfeited by the common law.'[1] What is more, it had been held that the most sweeping general words in acts of attainder would not transfer such rights to the crown; they were essentially inalienable, intransmissible rights.

But if we go behind Coke we find that so far from the law having been gradually altered to the detriment of the lords, if altered at all it had been altered to their profit. We come to a time when there seems the greatest uncertainty whether the lord can get the land from the very disseisor. The writ of escheat, his only writ, distinctly says that his tenant has died seised. I do not wish to dogmatize about a very obscure history, but it will be enough to say that under Henry VII Brian C. J. denied that the lord could enter or bring action against the disseisor.[2]

It was so with the other feudal casualties. Coke says[3] that if the disseisee die having still a right of entry and leave an heir within age the lord shall have a wardship. Doubtless the law was so in his day, but the earliest authority that he cites is from the reign of Edward III and to this effect — 'In a writ of ward it is a good plea that the ancestor of the infant had nothing in the land at the time of his death; for if he was disseised the lord shall *not* have a wardship, neither by writ of ward nor by seizing him [the

[1] *Winchester's Case*, 3 Rep. 2 b.

[2] It may be convenient if I here collect in chronological order the main authorities as to escheat and forfeiture of rights of entry and rights of action. Reg. Brev. f. 164 (F. N. B. f. 144); 27 Ass. pl. 32. f. 136, 137; Fitz. Abr. *Entre Congeable*, pl. 38 (Hil. 2. Ric. 2); 2 Hen. 4. f. 8. (Mich. pl. 37); 7 Hen. 4. f. 17 (Trin. pl. 10); 32 Hen. 6. f. 27 (Hil. pl. 16), comp. Litt. sec. 390; 37 Hen. 6. f. 1 (Mich. pl. 1); 15 Edw. 4. f. 14 (Mich. pl. 17), per Brian; 6 Hen. 7. f. 9 (Mich. pl. 4); 10 Hen. 7. f. 27 (Trin. pl. 13); 13 Hen. 7. f. 7 (Mich. pl. 3); Bro. Abr. *Eschete*, pl. 18; Co. Lit. 240 a, 268 a, b; 3 Inst. 19; 3 Rep. 2, 3, 35 a; 8 Rep. 42 b; Hale, P. C. Part I, ch. 23; Hawk, P. C. Bk. 2, ch. 49, sec. 5: *Burgess* v. *Wheate*, Eden, 177, 243. It will be noticed that none of these authorities, except perhaps the writ in the Register, is older than the middle of the fourteenth century.

[3] 3 Rep. 35 a; Co. Lit. 76 b.

heir], until the tenancy is recontinued.'[1] But at all events of a right of action there was no wardship. On the other hand, if the disseisor died without an heir the lord got an escheat, if the disseisor died leaving an infant heir the lord got a wardship, though in either case his rights were defeasible by the disseisee. In short, the lord must take his chance; it is no wrong to him if his tenant be disseised; he cannot prevent this person or that from acquiring seisin, yet thus he may be a great loser or a great gainer. The law about seisin pays no regard to his interests.

There is another side to the picture we have here drawn. He who is seised, though he has no title to the seisin, can alienate the land; he can make a feoffment and he can make a will (for he who *has* land is enabled to devise it by statute), and his heir shall inherit, shall inherit from him, for he is a stock of descent; and there shall be dower and there shall be curtesy, and the lord shall have an escheat and the king a forfeiture, for such a one has land 'to give and to forfeit.' This may make seisin look very much like ownership, and in truth our old law seems this (and has it ever been changed?[2]) that seisin does give ownership good against all save those who have better because older title. Nevertheless we err if we begin to think of seisin as ownership or any modification of ownership; after all it is but possession. A termor was not seised, but certainly he could make a feoffment in fee and his feoffee would be seised. This seems to have puzzled Lord Mansfield,[3] and puzzling enough it is if we regard seisin itself as a proprietary right, for then the termor seems to convey to another a right that he never had. But when it is remembered that substantially seisin is possession, no more, no less, then the old law becomes explicable. My butler has not possession of my plate, he has but a charge or custody of it; fraudulently he sells it to a

[1] Fitz. Abr. *Garde*, pl. 10.

[2] See *Asher* v. *Whitlock*, L. R. 1 Q. B. 1. Holmes, Common Law, p. 244.

[3] I refer of course to *Taylor* v. *Horde*, 1 Burr. 60, a case which profoundly dissatisfied the great conveyancers of the last century, and which has lately put Mr. Challis to his Greek (Real Property, p. 329). Butler's note on this case (Co. Lit. 330 b) seems to me the best modern account of seisin that we have.

silversmith; the silversmith now has possession: so with the termor, who has no seisin, but who by a wrongful act enables another to acquire seisin.

But, it will be urged, the termor's feoffee (here is the difficulty) acquires an estate in fee simple and no less estate or interest. Certainly, and what of the silversmith who buys of the fraudulent butler? He has possession, and in a certain sense he possesses as owner; he claims no limited interest, such as that of a bailee, in the goods. How his rights would best be described at the present day we need not discuss, but it seems plausible to say that at least if an innocent purchaser, he has ownership good against all save those who have better because older title.[1] Regarded from this point of view the termor's tortious feoffment is no anomaly. It is true that in our modern law there may be nothing very analogous to the process whereby an infirm title gained strength as it passed from man to man, the ousted owner losing the right to enter before he lost the right of action; still it is conceivable that in the interests of public peace law should, for example, permit me to take my goods by force from the thief himself, but not from one to whom the thief has given or sold them, nor from the thief's executor. Thus would my entry be tolled and I should be put to my action.[2]

But this by the way, for the position of the non-possessed owner is more interesting and less explicable than that of the possessed non-owner. Now we seem brought to this, that ownership, mere ownership, is inalienable, intransmissible; neither by act of the party nor by act of the law will it pass from one man to another. The true explanation of the foregoing rules will I believe be found in no considerations of public policy, no wide views of social needs, but in what I

[1] Holmes, Common Law, p. 241.

[2] Coke (Co. Lit. 245 b) says that 'by the ancient law' the entry of the disseisee was tolled not only by a descent cast, but by the disseisor's feoffment followed by non-claim for year and day. There was very similar law both in France and in Germany, as may be seen at large in Laband, *Die Vermögensrechtlichen Klagen*, and Heusler, *Die Gewere*. I have never been able to find definite authority for Coke's statement, but it looks to me very probable. It deprives the descent cast of its isolated singularity, and fits in with the learning of fines.

shall venture to describe as a mental incapacity, an inability to conceive that mere rights can be transferred or can pass from person to person. Things can be transferred; that is obvious; the transfer is visible to the eye; but how rights? you have not your rights in your hand or your pocket, nor can you put them into the hand of another nor lead him into them and bid him walk about within their metes and bounds. 'But,' says the accomplished jurist, 'this is plain nonsense; when a gift is made of a corporeal thing, of a sword or a hide of land, rights are transferred; if at the same time there is a change of possession, that is another matter; whether a gift can be made without such a change of possession, the law of the land will decide; but every gift is a transfer of ownership, and ownership is a right or bundle of rights; if gift be possible, transfer of rights is possible.' That, I should reply, doubtless is so in these analytic times; but I may have here and there a reader who can remember to have experienced in his own person what I take to be the history of the race, who can remember how it flashed across him as a truth, new though obvious, that the essence of a gift is a transfer of rights. You cannot give what you have not got: — this seems clear; but put just the right accent on the words *give* and *got*, and we have reverted to an old way of thinking. You can't give a thing if you haven't got that thing, and you haven't got that thing if some one else has got it. A very large part of the history of Real Property Law seems to me the history of the process whereby Englishmen have thought themselves free of that materialism which is natural to us all.

But it will be said to me that this would-be explanation is untrue, or at best must take us back to a merely hypothetical age of darkness, because from time immemorial there were rights which could be transferred from man to man without any physical transfer of things, namely, 'the incorporeal hereditaments which lay in grant and not in livery.' In truth however the treatment which these rights receive in our oldest books is the very stronghold of the doctrine that I am propounding. They are transferable just because they are regarded not as rights but as things,

because one can become not merely entitled to, but also seised and possessed of them, corporeally seised and possessed. Seisin, it may be, cannot be delivered; I cannot put an advowson into your hand, nor can an advowson be ploughed and reaped; nevertheless the gift of the advowson will be far from perfect until you have presented a clerk who has been admitted to the church. In your writ of right of advowson you shall count that on the presentation of yourself or your ancestor a clerk was admitted, nay more, that your clerk exploited the church, took esplees thereof in tithes, oblations and obventions to the value of so many shillings.[1] But we may look at a few of these things incorporeal a little more closely.

And first then of seignories, reversions, remainders. These, it is said, lie in grant. But for all that the tenant of the land must attorn to the grantee; the attornment is necessary to perfect the transfer of the right. Such was the law in 1705.[2] Whence this necessity for an attornment?

It may be replied: — Here at all events is a feudal rule. Just as (before the beginning of clear history) the tenant could not alienate the land without the lord's consent, so in the reign of Queen Anne the lord could not alienate the seignory without the tenant's attornment. There was a personal bond between lord and vassal; the need of attornment is to start with the need of the tenant's consent, though certainly in course of time he could be compelled to give that consent.

Now it may not be denied that in this region feudal influence was at work. To deny this one must contradict Bracton. But the sufficiency of the explanation should not be admitted until some text of English law is produced which says that the tenant can as a general rule refuse consent to

[1] *Capiendo inde expleta;* this phrase conveys a sense of manifest and successful achievement. When the possessor takes a crop from his land, he achieves, exploits his seisin; his seisin is now explicit. See Skeat, s. v. *explicit, exploit.* There is a great mass of information in Ducange, s. v. *expletum.* Coke, 6 Rep. 58, gives almost the true meaning, though his etymology is at fault; he derives the word from *expleo* (instead of *explico*) and says that the grantee of a rent hath not a perfect and explete or complete estate until he hath reaped the esplees, *scilicet* the profit and commodity thereof.

[2] 4 & 5 Ann. c. 16. sec. 9.

an alienation. Bracton does say that except in exceptional cases there can be no transfer of *homage* unless the tenant consents; on the other hand he says that all other services can be transferred and the tenant shall be attorned *velit nolit*.[1] It is of course possible to regard this state of things as transitional, to urge that in Bracton's day the tenant had already lost a veto on alienation that he once had; but before we adopt this theory let us see how much less ground it covers than the rules which have to be explained.

(*a*) The doctrine of attornment holds good not only of a seignory and of a reversion but of a remainder also;[2] but between the remainderman and the tenant of the particular estate there is no tenure, no feudal bond.

(*b*) Much the same doctrine holds good when what has to be conveyed is the land itself (immediate freehold) but that land is in lease for years. Here the transfer can be made in one of two ways. There may be a grant and then attornment will be necessary,[3] or there may be a feoffment. But if there is to be a feoffment, either the termor must be a consenting party or he must be out of possession.[4] If the termor chooses to sit upon the land and say 'I will not go off and I will not attorn myself,' there can be no effectual grant, no effectual feoffment; recourse must be had to a court of law. But surely it will not be said that in the days of true feudalism, when, as we are told, the termor was regarded much as his landlord's servant, he had a legal right to prevent his landlord from selling the land?

(*c*) The doctrine of attornment holds good of rents not incident to tenure.[5] The terre-tenant will not hold of the grantee of the rent, nevertheless he must attorn if the grant is to have full efficacy. Indeed the learning of rents as it is in Coke,[6] and even as it is at the present day, seems to me very suggestive of an ancient mode of thought. The rent is regarded as a thing, and as a thing which has a certain

[1] Bract. f. 81 b, 82. The writs for compelling attornment are the *Quid juris clamat* and the *Per quae servitia*.
[2] Co. Lit. 309 a; Lit. sec. 569.
[3] Lit. sec. 567.
[4] Co. Lit. 48 b; *Bettisworth's Case*, 2 Rep. 31, 32.
[5] Co. Lit. 311 b.
[6] *Brediman's Case*, 6 Rep. 56 b.

corporeity (if I may so speak); you may be seised, physically possessed of it; you have no actual seisin until you have coins, tangible coins, in your hand. On getting this actual seisin much depended; in modern times a vote for Parliament.[1] An attornment would give you a fictitious 'seisin in law;' nothing but hard palpable cash would give you seisin in fact. Such an incorporeal hereditament as a rent can be given by man to man just because it occasionally becomes corporeal under the accidents of gold or silver; this seems the old theory.

Now as to attornment, a valuable analogy lies very near to our hands. Suppose that we shut Coke upon Littleton and open Benjamin on Sales. Describing what will be deemed an 'actual receipt' of sold goods within the meaning of the Statute of Frauds, Mr. Benjamin writes thus:—'When the goods, at the time of the sale, are in the possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. . . . All of the parties must join in the agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent.'[2] This is familiar law, and surely it explains much. Baron Parke used a very happy phrase when he said that there is no 'actual receipt' by the buyer 'until the bailee has attorned, so to speak' to the buyer, a happy phrase for it explained the obscure by the intelligible, the old by the modern.[3]

Without transfer of a thing there is no transfer of a right.

Starting with this in our minds, how, let us ask, can a reversioner alienate his rights when a tenant for life is seised, how can a tenant in fee simple alienate his rights

[1] *Orme's Case*, L. R., 8 C. P. 281; *Hadfield's Case*, ibid. 306. The last Reform Act (48 Vict. c. 3, sec. 4) has, one regrets to say, made it improbable that we shall have in the future similar displays of antique learning.

[2] Benjamin, Sales, 2nd ed., p. 132.

[3] *Farina* v. *Home*, 16 M. & W. 119. I believe that it was Parke, B. who first introduced the term 'attornment' into the discussion of cases concerning the sale of goods; but in this I may be wrong.

when there is a termor on the land? There is but one answer. The person who has the thing in his power must acknowledge that he holds for or under the purchaser. If he does this, then we may say (as we do say when construing the Statute of Frauds) that the purchaser has 'actually received' the thing in question. It is I admit difficult to carry this or any other theory through all the intricacies of our old land law. The fact that in course of time there came to be two legally recognized possessions, first the old-fashioned possession or seisin which no termor can have (*possessio ad assisas*), and then the new fashioned possession which a termor can have (*possessio ad breve de transgressione*), complicates what, to start with, may have been a simple notion.[1] But the clue is given us in some words of Britton: — tenant in fee wants to alienate his land, but there is a farmer in possession; until the farmer attorns there can be no conveyance, *car la seisine del alienour sei continue touz juirs par le fermer, qui use sa seisine en le noun le lessour;*[2] the seisin is held for the alienor until the farmer consents to hold it for the alienee. So when the person on the land is tenant in fee simple, here doubtless he is seised on his own behalf, seised in demesne, but the overlord also is seised, seised of a seignory, or, as the older books put it, he holds the land in service (*non in dominico sed in servicio*); he holds the land by the body of his tenant; he can only transfer his rights if he can transfer seisin of the seignory; he transfers seisin when the tenant admits that he is holding under a new lord.[3] So with a rent which 'issues out of the land;' we cannot make a rent issue out of land, or turn the course of a rent already issuing, unless we can get at the land; if some one else has possession of the land, it is he that has the power to start or to divert the rent. This phrase 'a rent issuing out of land' would

[1] I have framed my Latin phrases on the model of Savigny's *possessio ad interdicta*. Seisin, we may say, is 'assize-possession.'

[2] Britton, vol. 2, p. 303.

[3] I am not sure that it was ever technically correct to say that the overlord is seised of the land; but in thirteenth century cases, he certainly has and holds the land, he has and holds it not in demesne, but in service. See Br. f. 432, 433. I have seen many cases to this effect; and I have seen *nunquam aliquam seisinam habuit nec in dominico nec in servicio*.

seem to us very wonderful and very instructive, had we not heard it so often. What a curious materialism it implies!

Bracton's whole treatment of *res incorporales* shows the same materialism, which is all the more striking because it is expressed in Roman terms and the writer intends to be very analytic and reasonable. *Jura* are incorporeal, not to be seen or touched, therefore there can be no delivery (*traditio*) of them. A gift of them, if it is to be made at all, must be a gift without delivery. But this is possible only by fiction of law. The law will feign that the donee possesses so soon as the gift is made and although he has not yet made use of the transferred right. Only however when he has actually used the right does his *possessio* cease to be *fictiva* and become *vera*, and then and then only does the transferred right become once more alienable.[1]

Of all these incorporeal things by far the most important in Bracton's day and long afterwards was the advowson in gross, and happily he twice over gives us his learning as to its alienability with abundant vouching of cases.[2] To be brief: — If *A* seised of an advowson grants it to *B*, and then the church falls vacant, *B* is entitled to present. Thus far have advowsons become detached from land. But if before a vacancy *B* grants to *C*, and then the parson dies, who shall present? Not *C*, nor *B*, but *A*. Not *C*, for though *B* had a quasi-possession when he made the grant he had no real possession, for he had never used the transferred, or partially transferred, right; he had nothing to give; he had nothing. Not *B*, for whatever inchoate right he had he has given away. No, as before said, *A* shall present, for the only actual seisin is with him. One has not really got an advowson until one has presented a clerk and so exploited one's right.

We may take up the learning of advowsons some centuries later. The following comes from a judgment not unknown to fame, the judgment of Holt in *Ashby* v. *White*.[3] He is illustrating the doctrine that want of remedy and want of

[1] Bracton, f. 52 b.
[2] Bracton, f. 54, 55, 246. See Nichols, Britton, vol. 2, p. 185, note f.
[3] Ld. Raym. 938, 953.

right are all one. 'As if a purchaser of an advowson in fee simple, before any presentment, suffer an usurpation and six months to pass without bringing his *quare impedit* he has lost his right to the advowson, because he has lost his *quare impedit* which was his only remedy; for he could not maintain a writ of right of advowson; and although he afterwards usurp and die and the advowson descend to his heir, yet the heir cannot be remitted, but the advowson is lost for ever without recovery.' So, as I understand, stood the law before the statute 7 Ann. c. 18. It comes to this, that if the grantee who has never presented suffers a usurpation, and does not at once use a special statutory remedy,[1] his right, his feeble right, has perished for ever. Writ of right he can have none, for he cannot count on an actual seisin. Very precarious indeed at Common Law was the right of the grantee who had not yet acquired what could be regarded as a physical corporeal possession of a thing. Indeed when we say that these rights lay in grant we use a phrase technically correct, but very likely to mislead a modern reader.

Space is failing or I would speak of franchises, for even to negative franchises, such as the right to be quit of toll, does Bracton apply the notion of seisin or possession; and the more the history of the incorporeal hereditaments is explored, the plainer will it be that according to ancient ideas they cannot be effectually passed from person to person by written words: there is seisin of them, possession of them, no complete conveyance of them without a transfer of possession, which, when it is not real must be supplied by fiction. But now if we put together all the old rules to which reference has here been made (and I will ask my readers to fill with their learning the many gaps in this brief argument), does it not seem that these 'very odd notions' of our ancestors, which Sir James Mansfield ascribed to 'particular causes,' were in the main due to one general cause? They point to a time when things were transferable and rights were not. Obviously things are transferable, but how rights?

[1] Stat. Westm. the Second (13 Edw. I), c. 5. The law is clearly stated by Blackstone, vol. 3, p. 243.

And here let us remember the memorable fact that the *chose in action* became assignable but the other day. The inalienability of the benefit of a contract, like the inalienability of the rights of the disseised owner, has been set down to that useful, hard-worked 'particular cause,' the prodigious jealousy of maintenance. The explanation has not stood examination in the one case,[1] I doubt it will stand examination in the other. According to old classifications the benefit of a contract and the right to recover land by litigation, stand very near each other. The land-owner whose estate has been 'turned to a right' (a significant phrase) has a thing in action, a thing in action real. There is a contrast more ancient than that between *jus in rem* and *jus in personam*, namely, that between right and thing. Of maintenance there is, I believe, no word in Bracton's book, but that there can be no *donatio* without *traditio* is for him a rule so obvious, so natural, that it needs no explanation, though it may be amply illustrated by cases on the rolls. What the thirteenth century learned of Roman law may have hardened and sharpened the rule, but it seems ingrained in the innermost structure of our law.

I am far from saying that within the few centuries covered by our English books it has ever been strictly inconceivable that a right should be transferred without some transfer of a thing, or without some physical fact which could be pictured as the use of a transferred incorporeal thing. Should it even be proved that the Anglo-Saxon charter or 'book' passed ownership without any transfer of possession, this will indeed be a remarkable fact, but far from decisive, particularly if the proof consist of royal grants. The king in council may have been able to do many marvellous feats not to be done by common men, and we know that ages before the year 1875 the king could assign his chose in action. But old impotencies of mind give rise to rules which perdure long after they have ceased to be the only conceivable rules, and then new justifications have to be found for the wisdom of the ancients, here feudalism, there a dread of maintenance, and there again a hatred of simony.

[1] Pollock, Principles of Contract, 4th ed., Appendix, Note G.

So long as the rules are unrepealed this rationalizing process must continue; judges and text-writers find themselves compelled to work these archaisms into the system of practical intelligible law. Only when the rules are repealed, when we can put them all together and look at them from a little distance, do they begin to tell their true history. I have here set down what seems to me the main theme of that history. For this purpose it has been necessary to speak very briefly and superficially of many different topics, about every one of which we have a vast store of detailed and intricate information. Before any theory such as that here ventured can demand acceptance, it must be stringently tested at every point and other systems of law besides the English should be considered. But it seemed worth while to draw notice to many old rules of law which we do not usually connect together, and to suggest that they help to explain each other and are in the main the outcome of one general cause.[1]

[1] There is one rule of our present Common Law which, were it very old, would make much against what I have said, the rule, namely, that the ownership of movables can be transferred by mere agreement, by bargain and sale without delivery. I have not forgotten this, but it seemed impossible to discuss in a paper already too miscellaneous a question which has divided two masters of the Year Books. Serjeant Manning has maintained that the rule is quite modern. Lord Blackburn, on the other hand, has found it in the books of Edward the Fourth. He was not concerned, however, to trace it any further, and it seems to me that the law of an earlier time required a change of possession on the one side or the other, delivery or part-delivery of the goods, payment or part-payment of the price. Perhaps at some future time I may be allowed to state what I have been able to find about this matter. Since this article was in print examples (A. D. 1305) of pleadings referring to the seisin of chattels have been brought to my notice by Mr. G. H. Blakesley: see Registrum Palatinum Dunelmense (ed. Hardy), vol. 4, pp. 45, 49, 63, 73.

69. THE HISTORY OF THE ACTION OF EJECTMENT IN ENGLAND AND THE UNITED STATES [1]

By Arthur George Sedgwick [2]
and Frederick Scott Wait [3]

§ 1. — The action of ejectment, the legal proceeding by which the title to land in most of the United States is now usually tried, was originally an action of trespass brought by a lessee or tenant for years to redress the injury inflicted upon him by ouster or amotion of possession. The lessee merely recovered damages for the loss of the term and of the possession, the measure of these being usually the mesne profits of the land from which he had been evicted. It was a purely personal action, in which neither lands nor tenements were recoverable, as opposed to a real action, in which a freehold interest in land was recovered or possession awarded.

The remedy of ejectment, as subserving the uses of a real action, in which important character we are about to consider it, has been termed "a modified action of trespass,"

[1] This Essay forms part of a "Treatise on the Trial of Title to Land, including Ejectment, Trespass to Try Title, Writs of Entry, and Statutory Remedies for the Recovery of Real Property" (New York: Baker, Voorhis, & Co., 1886), 2d edition, being pp. 1-47 of Chapter I, with a few omissions.

[2] Member of the New York Bar. Harvard University, A. B. 1864, LL. B. 1866; editor of the American Law Review, 1873; lecturer on law, Lowell Institute, Boston, 1885.

Other Publications: editor of the 5th, 7th, and 8th editions of (his father) T. S. Sedgwick's Treatise on the Measure of Damages, 1869-1890; Constitutional Protection of Property Rights, 1882; Elements of Damages, 2d ed. 1909.

[3] Member of the New York Bar. Union College (Albany Law School), LL. B. 1874; Secretary of Barnard College for Women (Columbia University); Secretary of the Legislative Committee of the New York Bar Association.

Other Publications: Fraudulent Conveyances and Creditors' Bills, 3d ed. 1897; Insolvent Corporations, 1888; and articles in legal journals and encyclopedias.

but more accurately speaking, the change effected was an enlargement of the original remedy rather than a modification of it.

§ 2. — The common law furnished an endless number of real writs to determine the rights of property in, or possession of, a freehold estate.[1] The highest technical skill and learning were requisite to comprehend and define the nature and purposes of these various writs, the distinctions between which were refined, abstruse, and often scarcely perceptible.[2] In personal actions, however, there were never many writs at common law. This very scarcity made personal actions attractive in early times, the pleader being seldom at a loss to know which writ to choose; while in real actions the most experienced practitioner, exercising the utmost care, frequently sued out a real writ of the wrong degree, class, or nature, thereby rendering the proceeding of no avail, and frequently imperiling the demandant's right to the proper writ or remedy. Not only were the distinctions between real writs very technical, and the selection of the proper writ a delicate task, but the proceedings under them were so inconveniently long, tedious, and costly, and the resources for delays so numerous, that the judgment when obtained was often a tardy and inadequate remedy.[3]

§ 3. — In real actions the practice required the demandant to set forth upon the record, with the utmost exactness and precision of statement, his legal title.[4] Great technical skill and ingenuity were requisite to select, frame, and adapt the count to the nature and circumstances of each particular case. A variance of scarcely a hair-breadth between the writ and the count (or pleading), or between the count and

[1] See chap. II.
[2] See §§ 3, 5, 6.
[3] See § 45. Booth on Real Actions, p. 159.
[4] Doe *d.* Hodsden *v.* Staple, 2 T. R. 684, per Lord Kenyon. See Stearns on Real Actions, p. 149; Reeves' Hist. Eng. Law (ed. 1880), vol. 4, p. 241. Mr. Reeves says: "The precision of the proceeding in real actions, where the matter in question was thoroughly canvassed in pleading, and reduced to a simple point before it was trusted to a jury, is thought to be ill changed for the present course, (by ejectment,) where the whole question is at once sent in the gross to trial upon the general issue, without any previous attempt to simplify or decide it with less circuity and expense." Reeves' Hist. Eng. Law, vol. 4, p. 241.

the evidence, was frequently fatal to the demandant. Equal precision and nicety of statement were required to interpose a meritorious plea, or to defend or defeat the action; while the power of amendment as understood and permitted in modern times was wholly unknown, and even the limited power which the courts possessed was exercised with reluctance. "At common law," says Baron Gilbert, "there was very little room for amendments."[1]

§ 4. — The Statute of 8 Henry VI, ch. 9, rendering more effectual Stat. 15 Rich. II, ch. 2, furnished a writ of forcible entry to recover possession of land,[2] which is one of the causes assigned by Sir Matthew Hale for the scarcity of real actions, or assizes, in the reports during the reigns of Edward IV, Richard III, and Henry VII.[3] It is the general belief that the idea of giving ejectment the effect of a real action originated from the practice and procedure under this statute concerning forcible entries. We may observe that prior to the use of ejectment by tenants for years to recover unexpired terms, the technical learning as to the management of real actions began to be less known and understood, and was speedily becoming a lost art.

§ 5. — The same distinguished writer observes, concerning the pleadings at this period (1422 to 1509), that "the pleaders, yea, and the judges too, became somewhat too curious therein, so that that art or dexterity of pleading, which, in its use, nature and design, was only to render the fact plain and intelligible, and to bring the matter to judgment with a convenient certainty, began to degenerate from its primitive simplicity, and the true use and end thereof, and to become a piece of nicety and curiosity."[4] Much prolixity and repetition in pleading, and the miscarriage of important causes resulted by reason of small mistakes or trivial refinements and subtleties in practice. The rules of pleading were so severe that the action abated if the same thing was twice demanded in the writ;[5] or if by mistake too many

[1] Gilbert's Hist. and Prac. Common Pleas, p. 107.
[2] See § 94.
[3] Hale's Common Law (ed. 1794), p. 301.
[4] Hale's Common Law, p. 301.
[5] Stearns on Real Actions (2d ed.), pp. 86-134; Booth on Real Actions (Am. ed., 1808), p. 2.

demandants had been joined;[1] or if the tenant pleaded non-tenure where the demandant claimed more land than the tenant was possessed of;[2] or if the demandant had by mistake declared on the seizin of his father instead of his grandfather.[3] Nor could the demandant abridge his demand,[4] though he might enter a *nolle prosequi* as to a distinct part of the claim.[5] The substantial merits or justice of the cause were frequently overlooked or disregarded by the judges, and the action or defense wrecked by some frivolous variance or captious objection bearing no relation to the merits of the controversy.

It must be remembered that some real actions "were to be brought in a particular court; some lay only between particular persons; others, for and against those only who had particular estates, with various other circumstances that were requisite antecedent to bringing the action."[6] It was an era of critical precision in pleading and practice, substance being sacrificed to form. This is what led Lord Mansfield to observe that the modern action of ejectment was "invented under the control and power of the court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being entangled in the nicety of pleadings on either side."[7]

§ 6. — Parliament did not interpose to reform these evils, or attempt to rid real actions of the intolerable abuses which sprang from them. The duty devolved upon the courts to correct, without legislative aid, the evils which they had themselves created and fostered. Real writs became not only a source of oppression and injustice to suitors, but of scandal and reproach to the system of remedial law of which they formed a part. By vouching over,[8] demanding view,[9]

[1] See Treat *v.* McMahon, 2 Greenl. (Me.) 120.
[2] See Stearns on Real Actions (2d ed.), p. 181 [208].
[3] Ibid, p. 186 [215].
[4] Com. D., title Abridgment A, 2.
[5] Somes *v.* Skinner, 16 Mass. 348, 357.
[6] Reeves' Hist. Eng. Law, vol. 4, p. 69.
[7] Aslin *v.* Parkin, 2 Burr. 665, 668.
[8] Calling in a grantor who had warranted the title to defend the action.
[9] This consisted in the issuance of a writ requiring the sheriff to cause the tenant to have view of the land in dispute, which the demand-

and praying aid,[1] a skilful practitioner could prevent the joinder of issue term after term for years, and the trial of the action was frequently delayed until one of the parties died, whereupon the whole proceeding abated, and a new writ became necessary.[2]

§ 7. — We can, therefore, easily imagine with what eagerness both court and counsel availed themselves of the loophole which was at length discovered, by means of which the questions ordinarily raised in a real action could be brought up and decided in a personal action, and, at least so far as possession was concerned, the results of a real action attained in a simple action of trespass. By this means the title to real estate was tried in a proceeding "shaped and moulded by the court in such a manner as to relieve it from many of the technical difficulties which encumbered the ancient real actions."[3] The change was probably too radical and went too far. While it relieved the plaintiff of many embarrassments it sent the unfortunate tenant to trial without specific knowledge of the character of the title which was to be proved against him.

§ 8. — It is impossible to trace with precision, at this late day, the immediate circumstances which led to the sudden abandonment of real writs. The reasons assigned by the early writers are fragmentary and imperfect. Mr. Sergeant Adams, who wrote early in the century, says,[4] that "neither the causes which led to this important change, nor

ant was required to point out to the tenant, indicating the metes and bounds.

[1] This was a petition for help, as, for instance, calling in a reversioner or other interested party, to aid in the defense of the writ.

[2] See Pierce *v.* Jaquith, 48 N. H. 231.

[3] See Crandall *v.* Gallup, 12 Conn. 366, 371.

[4] Adams on Ejectment (4th Am. ed. 1854, by Waterman), p. 10, *9. We have, in writing this chapter, made use of Mr. Adams' excellent work on Ejectment. This book is the highest authority as to the early practice and procedure in the remarkable action of which it treats, but its usefulness has been superseded in America by the radical changes effected by modern legislation in our system of remedial law, more especially by the abolition of the fictions. Cole on Ejectment (Sweet, London), appeared in 1857. The learned author observes in his preface, that "the Common Law Procedure Acts of 1852 and 1854, and the New Rules, have rendered all previous Treatises of Ejectment of little or no value" in England. Longfield on Ejectment, 2d ed. Dublin, 1846, treats of the remedy in the Superior Courts of Ireland. These books are of very little practical value in this country.

the principles upon which it was founded, are recorded in any of the legal authorities of those times." All the other writers upon ejectment are singularly silent upon the subject.

The history of procedure nowhere presents a more curious fact, than that the owners of the soil should have suddenly relinquished a system of remedies which had been matured by the experience of centuries, and have consented to try titles to the freehold in a personal action, originally devised to protect the precarious estates of the inferior tenantry.

§ 9. — The controlling influence undoubtedly was, as we have said, that the forms and pleadings in real actions were minutely varied, according to the source and quality of the demandant's title, or the nature of the alleged disseizin, deforcement, or injury. But this very fact had been the boast of the early writers, who maintained that the assortment of real writs was so varied and complete that a demandant could suffer no injury and sustain no wrong, which there was not a real writ exactly suited to redress. Blackstone says that the provision, Westm. 2, 13 Edw. I, c. 24, for framing new writs, when wanted, was almost rendered needless by the very great perfection of the ancient forms. "And, indeed," he continues, "I know not whether it is a greater credit to our laws to have such a provision contained in them, or not to have occasion, or at least very rarely, to use it."[1] There is no doubt, however, that this supposed merit came, in process of time, to be a crying evil.

§ 10. — In ejectment the form of the action was always the same, without regard to the source or nature of the lessor's title, or the character of the disseizin, deforcement, or ouster.

This dispensed with the delicate task of selecting a writ exactly suited to the nature of each particular case, and the necessity of tracing or disclosing the demandant's title, or specifying the character of the ouster. To fully understand the historical causes which led to the substitution of ejectment for real actions, the change must be regarded as

[1] 3 Bla. Com. p. 184.

part of the general struggle for supremacy going on at about the same period between exact and general forms of procedure, specific and general pleading.

§ 11. — In the personal actions of trover and assumpsit, both of which assumed their modern form about the time that ejectments came into common use, a system of general pleading prevailed. This fact undoubtedly had an important influence in forming and popularizing ejectments. Suitors quickly discovered the advantages to a complainant of a remedy which enabled him to prove any title that he could produce at the trial, without the dangers incident to a variance, and which practically deprived the defendant of the right to vouch over, demand view, or pray aid.[1]

§ 12. *Ejectione firmæ.* — The writ of *ejectione firmæ* (probably modeled after *ejectione custodiæ*), out of which the modern action of ejectment has gradually grown into its present form, is not of any great antiquity.[2] In this action every fiction by which questions of title to land could be raised and decided, was encouraged and adopted.

The Court of Common Pleas had exclusive jurisdiction of real actions while ejectment could be brought in all three of the great common law courts. This fact contributed in no slight degree to the great favor with which the fictions in ejectment were received and encouraged by the judges of the King's Bench, for that court thereby acquired jurisdiction over real property concurrently with the Common Pleas. The practitioners in the King's Bench also encouraged ejectment, for it enabled them to share in the lucrative practice of the Common Pleas.[3]

[1] See § 6.

[2] See § 19.

[3] It seems an anomalous condition of affairs that jealousies existing between the different courts and their respective practitioners should have exerted any influence in formulating remedies. Mr. Baron Gilbert observes that in 14 H. 7 "it began to be resolved that an *habere facias possessionem* would lie to recover the *term* itself. It seems that about this time long terms had their beginning; and that since lessees for years could not by law recover the land itself, they used, when molested, to go into equity against the *lessors* for a *specific performance;* and against *strangers,* for *perpetual injunctions,* to quiet their possessions. This, drawing the business in the courts of *equity,* induced the courts of *law* to resolve, that they should recover the land itself by an *habere facias possessionem.*" Gilbert on Ejec. pp. 3, 4. See § 18.

§ 13. — In feudal times a freehold estate was the only acknowledged title to land. Estates for years were unknown. A demise of the possession of land for a term of years was not considered as conveying to the grantee any title to the land, but was construed merely as a covenant, contract,[1] or agreement between the lord and the tenant. The termor was considered as a bailiff to the freeholder or reversioner, or mere pernor of the profits,[2] and his term was regarded merely as a chattel.

§ 14. — The tenant was not made a party to controversies over the title to the freehold, and if a recovery was had against his lord, whether *bona fide* or covinous, the freehold was discharged of the term.[3] The lessee was remediless[4] until the statute of 21 Henry VIII, c. 15, allowed him to falsify fraudulent recoveries.[5] If the tenant was evicted by his lessor, he had a writ of covenant against him by which, under the old practice, he recovered the term as well as damages;[6] but, if ousted of his possession by a stranger, he was, prior to the time of Henry III, without remedy. He had, indeed, his writ of covenant against his lessor, but his only recovery was damages. He did not regain the term or possession.[7] Such a remedy was obviously inadequate, and the lessee frequently recovered nothing on his judgment.[8]

§ 15. — During the reign of Henry III, however, a writ was introduced by Walter de Merton or William Moreton,[9] chancellor of that king, which furnished the lessee, or termor, a remedy against any one who, claiming from his lessor, evicted him. By this writ, which was called "*Quare*

[1] See Bates *v.* Sparrell, 10 Mass. 323; 2 Bla. Com. p. 140.

[2] See Dorsey on Ejectment, p. 9.

[3] See Stearns on Real Actions (2nd ed.), p. 116; Dorsey on Ejectment, p. 9.

[4] Stearns on Real Actions, p. 116.

[5] Reeves' Eng. Law (ed. 1880), vol. 4, p. 349.

[6] 3 Bla. Com. p. 200.

[7] Ibid, p. 200; Reg. Brev. p. 227.

[8] Baron Gilbert, after observing that formerly estates for years were only "a precarious possession," says of the tenants that "if they were ousted by *strangers*, they could only have recovered damages for the loss of their possessions; and if they were ousted by their *lessors*, they could only seek a remedy from their covenants." Gilbert on Ejectment, by Runnington, p. 3.

[9] Reg. Brev. p. 227. "Provision was made," says Bracton, "*de consilio curiæ.*" (Bracton, *f.* 220).

ejecit infra terminum," the plaintiff recovered damages for the loss of so much of the term as the defendant had wrongfully withheld, and the sheriff put the lessee in possession for the unexpired portion of the term.

§ 16. — This writ required the defendant to show wherefore he deforced the plaintiff of certain premises which C. had demised to plaintiff for a term not yet expired, within which term the said C. sold the lands to the defendant, by reason of which sale the defendant had ejected the plaintiff.[1]

The writ was drawn either as a *præcipe* or a *si te fecerit securum*. When first introduced the former was considered the better form,[2] but in the time of Edward III the latter was universally adopted.[3]

§ 17. — It is to be noted that the writ ran, "by reason of which sale the defendant, etc." According to the authorities, it was a very essential part of the lessee's case that he should show that the defendant claimed under the lessor, for the writ would not lie against a stranger who ejected the lessee, and who, in so doing, did not rely upon any privity of title or estate with the lessor.[4]

Mr. Reeves[5] quotes Bracton as authority for the statement that the writ lay against *any* person who ejected the lessee, but a careful examination of Bracton's language has shown that he did not consider it so large a remedy.[6] The ancient authorities seem to be overwhelming in support of the view that the lessee must show that the defendant claimed under the lessor.[7]

[1] Reg. Brev. p. 227; F. N. B. p. 197.

[2] Bracton, f. 220; Reeves' Hist. Eng. Law (Am. ed. 1880), vol. 2, p. 137.

[3] Reeves' Hist. Eng. Law (ed. 1880), vol. 3, p. 232.

[4] 18 Edw. II, f. 599.

[5] Reeves' Hist. Eng. Law (ed. 1880), vol. 2, p. 136; Bracton, f. 220.

[6] See Adams on Ej. (4th ed. 1854) p. 7, *4, where Mr. Reeves' interpretation of Bracton is shown to be erroneous.

[7] See Stat. Abr. Title "Quare Ejecit." "In *quare ejecit* plaintiff shall recover his term, and damages by him sustained *by reason of the sale*." Reg. Brev. p. 227: "Sciendum est quod breve (sc. *Quare Ejecit*), . . . habet fieri quando A, dimisit B, decem acras terræ ad terminum decem annorum, & idē A, durante termino illo vendit eandem terram C, in feodo, occasione cujus venditionis durante adhuc termino prædicto, idem C, ipsum B, de prædicta terra ejecit. . . . Fuit hoc breve inventum per discretum virum Wilhelmum de Merton ut terminarius recuperet catalla sua versus feoffatum." See, also, 18 Edw. II, f. 599; Hil. Term,

Furthermore, it is difficult to imagine any reason for the introduction of the writ of *ejectione firmæ* more than half a century after *quare ejecit* was devised, if the latter writ would run against a stranger.

§ 18. — The title of a lessee or tenant for years was not, as yet, of sufficient importance to receive any consideration from the courts in actions affecting real property, nor was the lessee allowed to make his precarious estate the basis on which to raise or discuss questions of title to land with a stranger. That duty devolved upon the freeholder or lord, and the lessee's redress, as against a stranger, was to induce the lord to institute a real action to regain the freehold. If the lord or freeholder neglected to institute the action, or, as frequently occurred, was in collusion with the stranger, the unfortunate tenant for years next applied to a court of equity, to compel a specific performance of the lease or contract by the lessor,[1] and as against strangers for a perpetual injunction to quiet the possession.[2]

§ 19. — During the reign of Edward II, or the early part of the reign of Edward III, a new writ made its appearance, which gave the termor or tenant for years a remedy against strangers, who, not claiming under the lessor, entered and evicted the lessee. This new remedy was in its nature a writ of trespass. The first mention of it in the reports refers to it simply as a writ of trespass.[3] Later it acquired the name of *ejectione firmæ*. The purpose of the writ was to give the plaintiff damages for the injuries inflicted upon him in being evicted from his possession by the defendant.[4]

46 Edw. III, f. 4, pl. 12; Gilbert on Ejectment (2nd ed.), p. 123; also, Roscoe on Actions Relating to Real Property, p. [98]: *Quare ejecit*, &c., only lies where the ejector claims title under the lessor, and not against a mere stranger, for, in the latter case, the remedy was by *ejectione firmæ*. F. N. B. II, p. 197; 19 Henry VI, p. 56, f. 19; 21 Edw. IV, pp. 10, 30, per Choke, J.: "Quare Ejecit, &c., lieth where one is in by title, *ejectione firmæ*, where one is in *by wrong*." See Reeves' Hist. Eng. Law (1880), vol. 3, p. 232, note (*a*).

[1] Gilbert on Ejectment, p. 2; Stearns on Real Actions (2nd ed.), p. 56 [54]; Runnington on Ejectment, p. 5.

[2] See § 12, note.

[3] "A certain Adam brings writ of trespass against R. of S., and K. of D., for that with force and arms he ejected him from a manor, which he holds for a term under the lease of one B." 44 Edw. III, f. 22, pl. 26.

[4] See § 12.

§ 20. — The writ required the defendant to show wherefore, with force and arms, he entered upon certain lands which C. has demised to plaintiff for a term not yet expired, and ejected the said plaintiff from his farm. There was usually a clause, charging that the defendant had carried off the plaintiff's goods and chattels, and often a clause declaring that he had occupied the premises for a long time.[1] The process, as upon all writs of trespass, was by attachment, distress, and outlawry.

§ 21. — Blackstone says, that, "For this injury (*i. e.*, ouster or amotion of possession from an estate for years) the law has provided him [the lessee] with two remedies, according to the circumstances and situation of the wrong-doer: the writ of *ejectione firmæ*, which lies against any one — the lessor, reversioner, remainderman, or any stranger, who is himself the wrong-doer and has committed the injury complained of; and the writ of *quare ejecit infra terminum*, which lies not against the wrong-doer or ejector himself, but his feoffee or other person claiming under him."[2] This distinction is not warranted by the authorities, and the commentator's position is not sustained by the form of the writ *quare ejecit infra terminum*, which alleges an ejectment *by the defendant*. The entry and wrongful act of the defendant created the cause of action against him, not any act of his lessor. It would be extraordinary if an alienee of a wrong-doer was liable in damages for the torts committed by his alienor. Damages always constituted a part of the recovery, and when the term had expired the only recovery in *quare ejecit*.[3]

§ 22. — The writ of *ejectione firmæ* issued in all cases except that where the ejector claimed under the lessor resort was usually had to the older writ of *quare ejecit infra terminum*. Even the grantor was liable to be sued on this writ, notwithstanding the old doctrine that a man could not enter, *vi et armis*, into his own freehold.[4]

[1] Reg. Brev. f. 227, 228.
[2] 3 Bla. Com. p. 199.
[3] Mr. Reeves falls into the same error. "The second (sc. *quare ejecit infra terminum*) lay only against the alienee of the ejector." Reeves' Hist. Eng. Law (1880), vol. 4, p. 237. See Bel. p. 159.
[4] Reeves' Hist. Eng. Law (ed. 1880), vol. 3, p. 233.

§ 23. — In the action of *ejectione firmæ*, the plaintiff at first only recovered damages, as in any other action of trespass. The remedy of damages was, however, often inadequate. The courts, consequently following, it is said, in the footsteps of the courts of equity,[1] and probably by analogy with the form of recovery in *quare ejecit*, introduced into this action a species of relief not warranted by the original writ, nor included in the prayer of the declaration, which sounded for damages only, and was silent as to any restitution — viz., a judgment to recover the term, and a writ of possession thereupon. Possibly the change was inspired by jealousy of the chancery courts.[2]

§ 24. — It cannot be stated precisely when this change took place. In 1383 it was conceded by the full court that in *ejectione firmæ* the plaintiff could no more recover his term than in trespass he could recover damages for a trespass to be done.[3] The decision shows that the point was then debated. The same doctrine was held in 1455 by one of the judges.[4]

§ 25. — But in 1468 it was agreed by opposing counsel that the term could be recovered, as well as damages.[5] The earliest reported decision to this effect was in 1499,[6] and is referred to by Mr. Reeves as the most important adjudication rendered during the reign of Henry VII,[7] for it changed

[1] Reeves' Hist. Eng. Law (ed. 1880), vol. 4, pp. 237, 238; 3 Bla. Com. p. 200. The nature of this equitable jurisdiction cannot be clearly defined. The authorities usually cited are Lill. Prac. Reg. p. 496, quoting 27 Henry VIII, p. 15; Litt. Rep. p. 166; 3 Bulst. p. 34 (Court of Marches), where it was held that the chancellor and the Counsell del Marches could quiet possessions, but had not the power to determine the title. The same equitable jurisdiction is exercised in some of the courts of the United States.

[2] See Dorsey on Ejectment, p. 10; Gilbert on Eject. p. 4. See § 12.

[3] Bel. p. 159.

[4] Mich. 33, Henry VI, f. 42, pl. 19.

[5] 7 Edw. IV, f. 5-10. Per Fairfax: *si home port ejectione firmæ, le Plaintiff recovera fon terme qui est arrere, si bien come in quare ejecit infra terminum; et, si nul soit arrere, donques tout m Damages.* (Bro. Abr. tit. *Quare ejecit infra terminum*, pl. 6.) See Gilbert on Eject. p. 4. See, also, 21 Edw. IV, f. 11; Jenk. Cent. p. 67, case 26.

[6] 14 Henry VII; Rast. Ent. f. 252.

[7] Reeves' Hist. Eng. Law (ed. 1880), vol. 4, p. 235. Mr. Gilbert observes that it "is a question, which has been much agitated, whether the term was recoverable in ejectment, prior to the reign of Henry VII. . . . Ejectment was NEVER laid with a *continuando;* consequently the

the whole system of remedies for the trial of controverted titles to land, and the recovery of real property.

§ 26. — The result was not foreseen at once, but in the next reign the action of ejectment came to be commonly applied to the trial of titles. Real actions disappeared save in a few cases where ejectments would not lie, and in the reign of Elizabeth were practically supplanted by the action of ejectment.[1] Real writs gradually sank into disrepute, and at length were chiefly resorted to by speculators and unprincipled practitioners of the law to defraud persons of low condition of their substance under pretense of recovering for them large estates to which they had no color of title.[2]

The Massachusetts Commissioners observe, (1834)[3] that "the real actions provided by the common law have been very little used in England for the last three centuries. Hence it has followed that the law relating to these actions has long ceased to be familiar to the members of the profession; and was to be sought for when wanted, in books which at first view appeared to many readers uninteresting and even repulsive."

§ 27. — Blackstone describes the practice under this new writ as follows:[4] "The better to apprehend the contrivance whereby this end is effected, we must recollect that the remedy by ejectment is in its original an action brought by one who hath a lease for years, to repair the injury done him by dispossession. . . . When . . . a person who hath right of entry into lands, determines to acquire that posses-

plaintiff in such action could NEVER recover damages for the mesne profits. Hence it may be inferred that the term was recoverable in ejectment, even prior to the reign of Hen. VII; for else, the plaintiff not recovering damages, the action must have been nugatory." Gilbert on Eject. p. 4.

[1] Alden's Case, 6 Rep. 105 (1601). Plea to a writ of *ejectione firmæ* was ancient demesne. It was answered and resolved that the plea was good, because the common intendment is, that the title and rights of the land will come in debate. "And forasmuch as at this day all titles of lands are for the greatest part tried in actions of ejectments, if in them ancient demesne should not be a good plea, the ancient privileges . . . would be utterly taken away and defeated." See Doe *d.* Poole *v.* Errington, 1 Ad. & El. 750; especially the learned note at page 756.

[2] Report of the English Real Property Commissioners, p. 42.

[3] Report of the Commissioners to Revise the General Statutes of Mass., part 3, p. 154, n.

[4] 3 Bla. Com. p. 201.

sion, which is wrongfully withheld by the present tenant, he makes (as by law he may) a formal entry on the premises; and being so in possession of the soil, he there, upon the land, seals and delivers a lease for years to some third person or lessee; and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him; or till some other person (either by accident or by agreement beforehand) comes upon the land and turns him out or ejects him. For this injury the lessee is entitled to his action of ejectment against the tenant, or this *casual ejector*, whichever it was that ousted him, to recover back his term and damages."

§ 28. — The plaintiff was required to show that he was on the land rightfully, and that his lessor had executed a valid lease. The title of the lessor, therefore, became an essential part of the plaintiff's case. An actual and formal entry by the lessor was necessary, for, by the old law, one conveying an interest in land, when out of possession, was guilty of maintenance, a penal offense. Indeed, it was doubted at first whether this occasional possession, taken merely for the purpose of conveying the title, excused the lessor from the legal guilt of maintenance.[1]

§ 29. — An actual ouster, by the tenant in possession was not requisite, for, if, after the lessee's entry under the lease, the tenant remained on the land, he was deemed, without any other act, to have ousted the lessee.[2]

§ 30. — It is matter of deep regret that the courts did not require proof that the ouster had been committed by the tenant in possession of the premises, for he was, of course the person most interested in opposing a change of possession. It was held in 1608, that the servant of the tenant in possession was a sufficient ejector;[3] but the line was not drawn

[1] 3 Bla. Com. p. 201; 1 Chanc. Rep. App. p. 39 [*76]; see Stat. 32 Henry VIII, c. 9, s. 2. Mr. Gilbert says: "The ancient practice was, that leases of ejectment, to try the title, should be actually sealed and delivered; because otherwise the plaintiff could maintain no title to the term; and they were also to be sealed on the land itself, it being maintenance to convey out of possession." Gilbert on Ejectment, p. 7.

[2] Lill. Prac. Reg. p. 674.

[3] Wilson *v.* Woddel, 1 Brownl. 143; Yelv. p. 144.

even here. Any one who came upon the land by chance after the sealing and delivery of the lease, with no intention of disturbing the possession of the lessee, was considered a sufficient ejector to be made defendant.[1]

§ 31. — The action as thus regulated was liable to great abuse, for the tenant could be turned out of possession without any notice of the suit, or opportunity of asserting or defending his title, on a judgment rendered by default against an ejector with whom he had no interests in common. The ejector was, in many instances, not affected by the judgment, and being, as a rule, friendly to the plaintiff, he frequently suppressed or concealed from the party in possession all knowledge of the suit.

§ 32. — The abuses resulting from these "clandestine ejectments" led to the establishment of a rule that no plaintiff should proceed in ejectment to recover the land against a casual ejector, unless notice of the suit was first given to the tenant in possession, if any there were.[2] The courts refused to sign judgment against the casual ejector unless proof of such notice was produced.[3] The tenant in possession was uniformly admitted to defend upon his undertaking to indemnify the defendant against the cost of the suit. The delivery to the tenant of the declaration, being the process for summoning the interested party into court, resembled the service of a writ, and as it constituted the only warning of the claimant's proceedings which the tenant in possession received, the courts were careful to see that a proper service or delivery was made.[4]

§ 33. — Much trouble and inconvenience, however, attended the observance of the different formalities. If several persons were in possession of the disputed lands it was considered necessary to execute separate leases upon the premises of the different tenants, and to commence a separate action upon each lease.[5] The remedy was as yet scarcely so simple and expeditious as to fully satisfy practitioners

[1] Lill. Prac. Reg. p. 673.
[2] 3 Bla. Com. p. 202.
[3] Rules B. R. Trin. 14 Car. II; Cooke's Rules and Orders.
[4] See Longfield on Ejectment, p. 33.
[5] Adams on Ejectment (4th ed.), p. 17 [*14].

who were seeking relief from the entanglements of real writs.

§ 34. — If a defense was interposed, the plaintiff was obliged to establish four points to maintain the action, viz., title, lease, entry,[1] and ouster.[2] *First*, he was compelled to show a good title in his lessor. *Secondly*, that his lessor, having such title, made a lease to him for a term not yet expired. *Thirdly*, that the plaintiff took possession under the lease. *Fourthly*, that the defendant ejected him.

§ 35. — To put the question of *title* to land solely in issue, and to eliminate all other controversies which might arise under this practice, a new feature was ingrafted upon the action by Lord Chief Justice Rolle, who presided in the court of the Upper Bench in the time of the Protectorate. We have seen that permission was granted by the court to the tenant in possession to defend the ejectment suit only as a matter of favor. The courts could, therefore, couple with the granting of this favor any equitable conditions that seemed proper.

§ 36. — Accordingly the practice invented by the Chief Justice, and afterwards generally adopted by the courts, was to require the tenant, as a condition of making him a party, to enter into a rule, called the *consent rule*, by which he agreed to confess at the trial the lease, entry, and ouster, and to insist and rely solely upon his title. A further condition was imposed that if the defendant broke this engagement at the trial he should pay the costs of the suit, and allow judgment to be entered against the casual ejector. This rule was considered highly reasonable because when the plaintiff had sealed the lease upon the land any person who came thereon *animo possidendi*, was, in strictness of law, an ejector, and, therefore, when any other ejector was placed in his stead it was proper that the courts should not allow him to exact proof of an actual *entry*, *demise*, and *ouster*; these being nothing more than mere forms devised to bring up the question of title, and which it would have been unnec-

[1] An *actual* entry was necessary to avoid a fine. Lord Audley *v.* Pollard, Cro. Eliz. 561; see 4 H. VII, c. 24.

[2] See Payne *v.* Treadwell, 5 Cal. 310.

essary for the plaintiff to establish against the casual ejector who would have allowed judgment by default.[1] It is the general belief that this novel practice was introduced about the year 1656, but we find it referred to in a case in Styles' Reports,[2] decided in 1625 in C. B., and as the practice was first established in the Upper Bench the proper date must be somewhat earlier.

§ 87. — The introduction of imaginary or fictitious persons as parties followed,[3] and was finally adopted as the universal practice, though reprobated by Blackstone,[4] chiefly on the trivial ground that the defendant could not collect his costs from an imaginary person. This objection was overcome by framing the consent rule so that in the event of judgment for defendant the plaintiff's lessor should pay the costs. The practice was briefly as follows: A., the claimant of the title, delivered to B., the tenant in possession, a declaration in ejectment, in which John Doe (or Goodtitle) and Richard Roe (or Badtitle) were respectively plaintiff and defendant. John Doe declared on a fictitious lease or demise of the lands from A. to himself for a term of years, and alleged that during the continuance of the term he was ousted from possession by Richard Roe. The title of the action then stood John Doe in the demise of A. against Richard Roe. To the declaration was annexed a notice signed by Richard Roe and directed to B., informing him as "a loving friend" that he (Roe) had been sued as a casual ejector, and advising B. to appear and cause himself to be made a defendant in his stead, otherwise he, Richard Roe, would suffer judgment to be entered by default, and

[1] See Gilbert on Ejec. p. 8.

[2] Styles' Reports, p. 368. "If one move that the title of land doth belong unto him, and that the plaintiff hath made an ejector of his own, and thereupon prays that, giving security to the ejector to save him harmless, he may defend the title, this court will grant it," &c. The practice is mentioned in the Court Rules in 1662; Cooke's Rules and Orders, B. R. Trin. 14 Car. II, and was continued under Charles II; See Davies' Case, 1 Keb. 28, P. 13, Car. II.

[3] See Cooke's Rules and Orders, B. R. Mich. 1654. We find a rule forbidding any attorney from acting as lessee in an ejectment, which shows that the lessee was not then an imaginary person.

[4] 3 Bla. Com. p. 203. The parties were imaginary in many cases in 1678. See Addison *v.* Otway, 1 Mod. 250-252.

B. would be turned out of possession.[1] The latter part of the notice, to the effect that unless the tenant defended his title he would be turned out of possession, was considered material,[2] for if the notice did not sufficiently apprise him of the consequences of his default the courts would probably have restored the tenant to the possession if he had been irregularly deprived of it by such a proceeding. As under the former practice, proof of service of the declaration and notice on B. was an essential prerequisite to the entry of judgment against the casual ejector. If there was no tenant in possession judgment could not be entered. Consequently in cases of vacant possession the old practice was followed, under which notice was required only in cases where there was a tenant. The plaintiff, on resorting to the old practice, was of course compelled to prove an actual lease, entry, and ouster.

§ 38. — If B. failed to appear, judgment was entered by default against the casual ejector. But, on appearing and entering into the *consent rule*, B. was substituted as defendant in place of the casual ejector, and could plead the general issue. If B. failed to appear on the trial and confess lease, entry, and ouster, the plaintiff was necessarily nonsuited, because the fictitious lease, entry, and ouster were not susceptible of proof.

§ 39. — By indorsing this cause of nonsuit on the *postea* the plaintiff was entitled to judgment against the casual ejector,[3] according to the condition imposed upon the tenant when he entered into the consent rule. A judgment against the casual ejector would be stricken out even after the lapse of several terms, upon the application of the real defendant if the latter was guiltless of laches, and made the application as soon as he had actual notice of the suit.[4] Though the declaration was served only on the tenant in possession, the landlord was admitted to defend[5] with the tenant, and not

[1] See Archbold's Practical Forms (N. Y. 1828), p. 363.
[2] Doe *d.* Darwent *v.* Roe, 3 Dowl. 336.
[3] Middleton's Case, 1 Keb. 246.
[4] Dennis' Lessee *v.* Kelso, 28 Md. 337.
[5] Styles' Rep. 368; Roch *v.* Plumpton, 1 Keb. 706; Anon., 12 Mod. 211; Roe *d.* Leak *v.* Doe, Barnes, 193.

in his stead.[1] After the statute, 11 Geo. II, c. 19, § 13, the landlord was admitted to defend instead of, as well as with, the tenant in possession. Who was a landlord so as to be entitled to defend, was a subject of much contention in the courts,[2] though the term was ultimately held to include every person whose title was connected and consistent with the possession of the occupier.[3]

§ 40. — If the plaintiff recovered judgment either by default or after contest and verdict, a writ *habere facias possessionem* was issued to the sheriff to put him in possession. This writ subserved in ejectment somewhat similar functions to an *habere facias seisinam* in a real action, or a writ of assistance in equity.[4]

§ 41. — The judgment, however, did not establish the title or right of property of the plaintiff to the land. He recovered the possession but not the seizin. He became possessed "according to his right." If he had a title in fee simple, he became thereby seized in fee simple; if he had a chattel interest he was in as a termor, but if he had no title he was in as a trespasser,[5] except that he was not liable in trespass for such an entry.

§ 42. — The judgment was not conclusive upon the title or right of property, even between the parties.[6] The action could be repeated and the same questions retried indefinitely,[7] because there was no privity between the successive fictitious plaintiffs, and the record and judgment, unlike a real action, did not reveal the nature of the title that had been established upon the former trial. Each successive ejectment was

[1] Balderidge *v.* Paterson, Barnes, 172; Goodright *d.* Duke of Montague *v.* Wrong, Barnes, 175; see Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, especially the learned argument of Mr. Harvey, one of the counsel, and Lord Mansfield's admirable statement of the nature of ejectment.

[2] See Lamb *v.* Archer, Comb. 208 (5 W. & M.); Jones *v.* Carwithen, Comb. 339 (7 Will. III); Strike and Dikes, Comb. 332.

[3] See Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, per Lord Mansfield.

[4] See Chap. XXI.

[5] See Jackson *v.* Haviland, 13 Johns. (N. Y.), 229-234; Witbeck *v.* Van Rensselaer, 64 N. Y. 27-31; People *ex rel.* Scudder *v.* Cooper, 20 Hun (N. Y.), 486; Doe *d.* Morgan *v.* Bluck, 3 Campb. 447; Equator Mining & Smelting Co. *v.* Hall, 106 U. S. 86; *s. c.* 5 Mor. Trans. 92.

[6] Clerke *v.* Rowell, 1 Mod. 10.

[7] Stark *v.* Starrs, 6 Wall. 409. See Chap. XX.

founded upon a *new* lease, entry, and ouster. The title was never formally or directly in issue, but was tried collaterally, or brought in question obliquely.[1] The gist of the action was the trespass of the defendant and the plaintiff's right of possession. Every fresh trespass was a fresh cause of action. As the right of property might be in one person, the right of possession in a second, and the actual possession in a third, a judgment for the possession did not necessarily conclude the title. Under the feudal system a peculiar sanctity attached to a man's right of possession of land, and when ejectments were introduced the courts were reluctant to hold that he must stake his possession upon the results of a single trial, but inclined to afford him ample and repeated opportunity to exhibit his title and prove his rights.

§ 43. — When this question of the conclusiveness of the judgment in ejectment came up in the Supreme Court of the United States, it was decided that, where the fictitious scaffolding of lease, entry, and ouster had been demolished, and the parties made the issue in their own names, the judgment was conclusive without being made so by statute.[2] Evidently the conclusion the court reached was that the inconclusiveness of the judgment was attributable to the fictions. The principles of this case, though undoubtedly sound, have not been universally acknowledged.[3]

§ 44. — The general policy in America has been to make the judgment in ejectment conclusive upon the title by statute, the defeated party being allowed one new trial as of right, and in some States still another trial in the discretion of the court for cause shown. This latter feature is peculiar to ejectment, and may be traced back to the old feudal idea of the sanctity of the tenure of real property. The policy is attributable either to distrust of the certainty of absolute

[1] See Caperton *v.* Schmidt, 26 Cal. 500.

[2] Sturdy *v.* Jackaway, 4 Wall. 174. This subject is discussed at length in Chapter XX, on the Judgment. See, further, Dawley *v.* Brown, 79 N. Y. 390; Doyle *v.* Hallam, 21 Minn. 515; Wilson *v.* Henry, 40 Wis. 594; Phillpotts *v.* Blasdel, 10 Nev. 19; Brownsville *v.* Cavazos, 100 U. S. 138; Gordinier's Appeal, 89 Pa. St. 528; Amesti *v.* Castro, 49 Cal. 325.

[3] Kimmel *v.* Benna, 70 Mo. 52; Hogan *v.* Smith, 11 Mo. App. 314; Dunn *v.* Miller, 8 Mo. App. 467.

justice in the courts, or to a disinclination to force the owner of land to risk his rights to his possessions upon a single trial.[1]

§ 45. — Lord Coke strenuously opposed the adoption of ejectments,[2] because they introduced "infiniteness of verdicts, recoveries, and judgments," and "sometimes contrarieties of verdicts and judgments, one against the other," in one and the same suit; and because the suits could be repeated for thirty or forty years, to the utter impoverishment of the parties, all of which tended "to the dishonor of the common law, which utterly abhors infiniteness and delaying of suits, wherein is to be observed the excellency of the common law, for the receding from the true institution of it introduces many inconveniences, and the observation thereof is always accompanied with rest and quietness, the end of all human laws." Yet in real actions, to which this great lawyer clung so tenaciously, the judgments were not always conclusive, and, as was decided in the case just cited,[3] did not bar new actions of a higher degree or nature. If ejectments could be repeated infinitely, a single real action could be prolonged for a lifetime. That the excessive technicalities incident to real writs tended to merge the end in the means, can be well illustrated by an extract from an accurate and highly respectable writer on real actions. Speaking of writs of formedon, Mr. Booth said, "I shall here at least give some light how long these actions may be regularly delayed before any judgment can be given in them, which is much for the advantage of the tenant, who ordinarily desires to keep the possession as long as he can."[4] The learned writer keeps his promise by a recital of the dilatory methods employed, and then states that "if there be many tenants and vouchers to be vouched over, it makes the delay possibly as long as the parties live, though the suit continue many years."[5]

[1] See Chap. XXII.
[2] Ferrer's Case, 3 Coke, 274.
[3] Ferrer's Case, 3 Coke, 274.
[4] Booth on Real Actions, p. 156; See Humphrey's Observations on Real Property, p. 134.
[5] Booth on Real Actions, p. 159.

Even the opinion of so distinguished and able a lawyer as Coke concerning the transcendent merits of real writs cannot be accepted against this unfavorable recital of the abuses connected with the system.

§ 46. — After a suitor in ejectment had prevailed in several trials, he applied to a court of chancery for a perpetual injunction against further ejectments, which that court, as a rule, seems to have been reluctant to grant, because every new ejectment supposes a new demise, and the costs were a recompense for the trouble and expense to which the possessor had been put.[1] The House of Lords, upon appeal, granted an injunction in the case of Earl of Bath *v.* Sherwin,[2] against further ejectments after five verdicts, in as many successive ejectments, had been rendered in three different counties in favor of the defendants.

§ 47. — An instructive and curious case in our own reports bearing upon this subject is Strother *v.* Lucas,[3] decided in the Supreme Court of the United States in 1838. The controversy was before the same court in 1832.[4] The court refers to the former decision and reaffirms the doctrine that a judgment in ejectment is not conclusive upon the right either of possession or of property, and says that the case now presents new features which the court deems it proper to pass upon and settle, otherwise a court of chancery might not think it proper to enjoin further suits "so long as new or material facts could be developed, or pertinent

[1] Runnington on Ejectment (ed. 1806), p. 12.

[2] 4 Bro. P. C. 373.

Suits to quiet title. — The statutes in force in many States permitting persons in possession to maintain a suit in equity, against any party claiming an interest in the land, adverse to the possessor, for the purpose of determining such claim and quieting the title, confer "a jurisdiction beyond that ordinarily exercised by courts of equity, to afford relief in the quieting of title and possession of real property. By the ordinary jurisdiction of those courts a suit would not lie for that purpose, unless the possession of the plaintiff had been previously disturbed by legal proceedings on the part of the defendant, and the right of the plaintiff had been sustained by successive judgments in his favor." Field, J., in Stark *v.* Starrs, 6 Wall. 409, citing Shepley *v.* Rangely, Davels, 242; Devonsher *v.* Newenham, 2 Schoales & Lef. 208; Curtis *v.* Sutter, 15 Cal. 259.

[3] 12 Peters, 410.

[4] See 6 Peters, 763.

points of law remained unsettled." The court then proceeds to clear the way for a perpetual injunction against further ejectments by discussing and deciding in all their bearings the various questions involved. This decision, it should be observed, was made before the question was raised as to the conclusiveness of the judgment, where the issue is between the real parties in interest, in their own names.

§ 48. — Though the general form of proceeding in ejectment was settled in the time of Charles the Second, yet the nature of the action was not clearly understood, nor the rules governing it definitely established until the beginning of this century. The changes which the remedy has undergone both at the hands of the courts and of the legislatures demonstrate that it never could have been regarded as an entirely satisfactory form of procedure.

§ 49. — The courts adopted an arbitrary system of regulating the action by permitting persons who had not been made parties to become defendants, and continued to exercise this jurisdiction by adopting whatever rules were thought to best accomplish the ends of justice. Thus, when the plaintiff was an actual person, it was held that his death did not abate the action, for the lessor was really the interested party, and the absurd suggestion that there lived a man of the same name in the county was considered sufficient.[1] The plaintiff was not allowed to release the costs, and was held in contempt for so doing;[2] and an attorney who assigned for error the death of the plaintiff in ejectment was adjudged in contempt.[3]

§ 50. — There was a wide divergence between the decisions, the natural result of regulating the action by the mere will or caprice of the judges, who differed frequently as to what decisions in particular instances best accomplished the ends of justice. Some cases were decided upon the theory that the action was, in its nature as well as origin, an action of trespass; that the damages constituted the principal recovery, the restoration of the term and possession being

[1] Addison *v.* Otway, 1 Mod. 250-252.
[2] Anon. Salk. 260. Such release was void. Close *v.* Vaux, Comb. 8.
[3] Moore *v.* Goodright, Stra. 899.

merely an incident.[1] Other cases were decided by analogy to real actions.[2] Thus it was held that the subject of the action must be demisable, and that the plaintiff must have power to demise.[3] On the other hand again an ejectment for a rectory was upheld.[4]

§ 51. — *Introduction of equitable principles by Lord Mansfield.* — The action underwent important changes in the time of Lord Mansfield, who declared[5] "that he had it at heart to have the practice upon ejectments clearly settled upon large and liberal grounds for advancement of the remedy." But he brought equitable principles into the trial of this action, as he did into other branches of the law, and favored and encouraged ejectment as an equitable remedy, calculated to subserve the ends of individual justice, rather than as a legal action governed by fixed and positive rules and principles. The judges in his time probably felt at liberty to exercise an equitable jurisdiction over the remedy as applied to land controversies because it was peculiarly their own creation. Thus a fresh ejectment for the same lands would be stayed until the costs of a former unsuccessful action had been paid.[6] A mortgagee was permitted to maintain ejectment against a tenant claiming under a lease granted prior to the mortgage, where he gave notice to the tenant that he did not intend to disturb the possession, but only to reach the rents and profits of the estate.[7] Nor could the legal estate of a trustee be set up against the *cestui que trust*,[8] and an agreement for a lease was held tantamount to a lease as a defense in ejectment.[9] These cases have been overruled in England and in the United States.[10]

[1] Wright *v.* Wheatley, Cro. Eliz. 854; Ibgrave *v.* Lee, Dyer, 116, b. (71).

[2] Barwick *v.* Fenwood, Comb. 250.

[3] Adams on Ejectment (4th Am. ed.), p. 20 [18].

[4] Doe *d.* Watson *v.* Fletcher, 8 B. & C. 25; Hillingsworth *v.* Brewster, Salk. 256. See Wrotesley *v.* Adams, Plowd. 187, 199.

[5] Fairclaim *d.* Fowler *v.* Shamtitle, 3 Burr. 1290, 1295.

[6] Doe *d.* Feldon *v.* Roe, 8 T. R. 646; Ralph, Lessee, *v.* Ejector, 3 Ir. Law Rec. N. S. 141.

[7] See note to Keech *v.* Hall, Doug. 21, 23.

[8] Bull. N. P. 110; Doe *d.* Bristow *v.* Pegge, 1 T. R. 758 n.

[9] Weakly *d.* Yea *v.* Bucknell, Cowp. 473.

[10] See Doe *d.* Hodsden *v.* Staple, 2 T. R. 684, per Kenyon, Ch. J.; Watkins *v.* Holman, 16 Peters 25, 58.

The principles and practice which the Court of King's Bench, during the career of this illustrious judge, sought to impress upon the remedy have been, in some instances since his time, introduced by statute. The common law has gained fresh vitality and enriched qualities from the transfusion of equitable principles into it. This is especially true with reference to the remedy of ejectment.

§ 52. — Lord Kenyon established the action upon what the common law student would consider a sounder basis. Since his day, when not otherwise controlled by statute, the courts have generally held that the plaintiff's lessor must establish a legal title. The claimant must have a right of entry, for if he made the lease without entering on the land, it was maintenance, and though in the modern practice an actual entry is unnecessary, yet the right of entry must exist, for that is the question to be tried.

§ 53. — The courts have generally looked beyond the fictitious form of the action, and have taken judicial notice that the real controversy is between adverse claimants to the possession of land; that the plaintiff's lessor and the tenant in possession (or landlord, if he be made defendant) are the real parties in interest;[1] that the legal title must prevail, and that, as the fictions were "fabricated for the mere purposes of justice," the plaintiff ought not to be defeated in his recovery by technical or captious objections founded on the peculiar and somewhat technical form of the action. It was unnecessary to allege of the day of the ouster.[2] The practice became common to allow amendments enlarging the term laid in the declaration when it expired pending the action, Chief Justice Marshall in granting such a motion remarking that there was "every reason for allowing amendments in matters of mere form."[3] The courts, recognizing the fictions as necessary to this form of action, were careful to see that no wrong or prejudice to the parties

[1] Aslin *v.* Parkin, 2 Burr. 665, per Lord Mansfield. See note to Doe *d.* Bailey *v.* Smyth, Anthon's Nisi Prius, 242, 244.

[2] Woodward *v.* Brown, 13 Peters 1.

[3] Walden *v.* Craig, 9 Wheat. 576. "Amendments are allowed rather more liberally in ejectments than in other actions." Longfield on Ejectment, p. 96.

resulted from the novel character of the procedure.[1] Though ejectment actions were in point of form pure fictions, yet in substance and effect they were "serious realities."[2] Even in the time of James I a liberal spirit guided the courts, and minute technical objections to the entry and ouster were disregarded.[3]

§ 54. — In many respects the rules applicable to real actions have been adopted,[4] yet the principles and practice governing personal actions have been in some instances retained unmodified, though apparently not suited to the new issue raised. Thus, unless some statute controls, the description of the premises need not be much more certain than in an ordinary action of trespass. The plaintiff may also recover a part, and in some cases an undivided portion, of the premises for which he declares.

§ 55. — The action is now divested by statute of all its useless forms. The fictitious lease and ouster have been abolished, and the real parties in interest appear in the action as the nominal parties; the defendant being the tenant or person in possession, or the landlord; sometimes even a claimant to the land or one exercising acts of ownership over it.

. . . . . .

§ 64. — *Real actions.* — Real or feudal actions were the ancient remedies by which the right of property, or of possession, in freehold estates or hereditaments was determined, and the seizin recovered or possession restored.[5] The complainant, or party deforced, was called the demandant; the defendant, or party in possession the tenant. The name real action was used in contradistinction to personal actions, founded upon tort or contract, such as trover, assumpsit,

[1] Cresap's Lessee *v.* Hutson, 9 Gill (Md.) 274; Warner *v.* Hardy, 6 Md. 525.

[2] Cole on Ejectment, p. 1.

[3] Longfield on Ejectment, p. 25; citing Adams *v.* Goose, Cro. Jac. 96; Tesmond *v.* Johnson, Cro. Jac. 428; Osbourn *v.* Rider. Cro. Jac. 135; Brigate *v.* Short, Cro. Jac. 154; Merrell *v.* Smith, Cro. Jac. 311.

[4] Heatherley *d.* Worthington *v.* Weston, 2 Wils. 232; Moore *v.* Fursden, 1 Show 342; Mantle *v.* Wollington, Cro. Jac. 166.

[5] See §§ 2, 3, 5, 6.

or debt. At common law, in purely real actions, the demandant counted for and recovered the seizin of land, or an interest in realty, and rarely proceeded for compensation in damages or for personal property.[1] The right to recover damages in real writs was, in some instances, added by statute.

The foundation of a real action is the alleged wrongful occupation and withholding of the demandant's land by the tenant.[2]

§ 64*a*. — In real actions the demandant claims title to lands, tenements, or hereditaments, in fee simple, fee tail, or for a term of life,[3] by writ of right, entry, etc., hence they are said by Blackstone to "concern real property only." Chief Justice Shaw considered that the terms real and personal actions were not used in the statute of Massachusetts regulating costs in the sense contemplated by the common law, and as defined by Blackstone. He said: "The broad distinction which runs throughout the statute, is that between actions in which rights to real estate may be brought in question and tried, and those which affect personal rights."[4]

§ 65. — Real actions were classified according to the nature of the demandant's title, into actions *droitural*, based upon the demandant's mere right of title — that of possession being lost — and actions *possessory*, which involved the right of possession. The former class was subdivided into writs *droitural*, founded upon the demandant's own seizin, and writs *ancestral droitural*, founded upon the demandant's claim in respect of a mere right which had descended to him from an ancestor. Possessory actions were likewise subdivided into actions founded upon the demandant's own seizin, and actions predicated upon the seizin of an ancestor.[5]

. . . . . .

[1] Booth on Real Actions, pp. 74, 75; Pilford's Case, 10 Rep. 115, b. (5 Coke, 459); Stearns on Real Actions (2d ed.), pp. 346 (389), 90 (94); Jackson on Real Actions, p. 99.

[2] Graves *v.* Amoskeag Mfg. Co., 44 N. H. 462.

[3] 3 Bla. Com. 117.

[4] Plympton *v.* Baker, 10 Pick. (Mass.) 474. See §§ 1, 64.

[5] Roscoe on Actions Relating to Real Property, p. 2; Stearns on Real Actions (2d ed.), p. 83 [84]; Markal's Case, 6 Rep. 3 b. (3 Coke, 264.)

§ 69. — *Writs of right.* — The most important of the real writs was the Writ of Right.[1] This writ was resorted to in the time of the Saxons to recover the right of property in land; the *jus proprietatis*, or *jus merum*.[2] It would not lie for incorporeal hereditaments, or for any estate less than a fee simple,[3] and was the exclusive remedy available to the owner of land who had lost the right to recover it by a possessory action. The judgment was final, and could be pleaded in bar of a fresh suit involving the same controversy, because no other writ could establish any different higher or additional rights. For this reason a writ of right was rarely selected by a demandant who was entitled to prosecute one of an inferior grade.[4] The tenant in this writ might give in evidence the title of a third person for the purpose of disproving the demandant's seizin; and the demandant was permitted to recover a less quantity than the entirety.[5]

§ 70. — *Writs of entry.* — Of the possessory actions writs of entry only were adopted in Massachusetts.[6] These were of various kinds, according to the nature of the injuries intended to be redressed,[7] and were supposed by Blackstone to be the most ancient of possessory actions. Whether or not all the writs of entry were ingrafted into the law of that Commonwealth is a moot question which it is unnecessary now to discuss.[8] Mr. Justice Jackson says,[9] that writs of entry, as conducted in the courts of his State, were considered more simple, convenient and effectual than the action of ejectment; the writ and declaration were shorter; there were no mysterious fictions to incumber the record, and the judgment effectually settled the right of posses-

[1] 3 Bla. Com. p. 193; Fitz. N. B. 1.
[2] Gil. Ten. [47]. See Roscoe on Actions Relating to Real Property, p. 19.
[3] Jackson on Real Actions, p. 276; Lyon *v.* Mottuse, 19 Ala. 463.
[4] Booth on Real Actions, p. 1. For distinction between a writ of right *patent* and a writ of right *close*, see Liter *v.* Green, 2 Wheat. 311.
[5] Inglis *v.* Trustees of Sailor's Snug Harbor, 3 Pet. 99. See § 509.
[6] Jackson on Real Actions, p. 2.
[7] Roscoe on Actions Relating to Real Property, p. 88.
[8] See Judge Jackson's article on this subject, 2 Am. Jur. p. 65.
[9] Jackson on Real Actions, p. 12.

sion. This opinion was subsequently approved by the Massachusetts Commissioners.[1]

An equitable estate, we may here observe, will not support a writ of entry;[2] and consequently a party sued in this writ cannot defend against the legal title of the plaintiff by showing that he has purchased and paid for the land, and is entitled to a conveyance of the legal estate.[3] The remedy for the protection of an equitable interest in land is by bill in equity and not by writ of entry,[4] or action at law. In Massachusetts this writ may issue in the form of an original summons or in that of a summons and attachment,[5] and can only be maintained against a tenant of the freehold.[6]

§ 71. — *Writs of formedon.* — Writs of formedon, the ancient remedies provided for any one having a right to lands or tenements by virtue of a gift *in tail*,[7] were not infrequent in some States. A writ of formedon was sometimes characterized as a writ of right of an inferior character. As late as 1834 a decision was rendered in an action of formedon in remainder in New Hampshire, in which the defense of a common recovery, levied in 1819, was learnedly discussed by court and counsel.[8] Writs of this character are, however, wholly unsuited to try titles in this country. The delays and abuses produced by these writs have already been noticed.[9]

. . . . . .

[1] Report of the Comrs. to Revise the General Statutes of Mass.; Part 3, p. 154 n.

[2] Chapin *v.* First Universalist Soc., 8 Gray (Mass.), 580, per Shaw, C. J.; Eastman *v.* Fletcher, 45 Me. 302. Compare s. p. in Ejectment, Smith *v.* McCann, 24 How. 398; Emeric *v.* Penniman, 26 Cal. 119; Peck *v.* Newton, 46 Barb. (N. Y.) 173.

[3] Ela *v.* Pennock, 38 N. H. 154; s. p. Moody *v.* Farr, 33 Miss. 192; but compare Cutting *v.* Pike, 21 N. H. 347. See Chap. XVIII.

[4] Eastman *v.* Fletcher, 45 Me. 305; s. p. Houston *v.* Jordan, 35 Me. 520; Shaw *v.* Wise, 10 Me. 113.

[5] Wilbur *v.* Ripley, 124 Mass. 468.

[6] Kerley *v.* Kerley, 13 Allen (Mass.), 286. See Creighton *v.* Proctor, 12 Cush. (Mass.) 438.

[7] Stearns on Real Actions, p. 321; Booth on Real Actions (1st Am. ed.), p. 138.

[8] Frost *v.* Cloutman, 7 N. H. 9.

[9] See § 45. The writ of assize once so popular in England was probably introduced during the reign of Henry II. Its history is of little practical value with us.

§ 73. — *Ejectment in New England.* — Ejectment was already firmly established in England, as the most simple and expeditious method of trying controverted titles, when our Atlantic seaboard was colonized. Yet the New England colonists seem to have been disinclined to transplant and foster the remedy.[1] Possibly this is attributable to the fact that every word of the declaration by which the action was commenced was untrue. The stern integrity and simplicity of the Puritans did not relish fictions. Professor Stearns says:[2] "We should hardly expect them to resort to the indirect method of *making a lease* of their lands in order to try the title. And as to the *confessing a lease, an entry*, and *an ouster*, which never had any existence in fact, they seem (as we should naturally expect) to have regarded it as a *violation of truth*, and therefore wholly inadmissible."

This feeling of aversion to ejectments was not confined to this country, for we find it written, in an English work of reputation,[3] that this ingenious and dexterously contrived proceeding "was objectionable, on the ground that fictions and unintelligible forms should not be used in courts of justice; especially when the necessity for them might be avoided by a simple writ so framed as to raise precisely the same question in a true, concise, and intelligible form."

§ 74. — The inconclusiveness of the judgment[4] also tended to render ejectment unsatisfactory. Lands in the new world were of little value, and scarcely worth the trouble and expense of a sufficient number of trials to justify a perpetual injunction against fresh ejectments. Furthermore equity jurisprudence had scarcely any existence in colonial times,[5] and has only been introduced into some of our States by legislation of recent date. Hence, according to eminent authority, only two fictitious actions of ejectment upon the English model are to be found in the court records of Massa-

[1] Ejectment did not flourish in Virginia. New York was then under control of the Dutch.
[2] Stearns on Real Actions (2d ed. 1831), p. 352 [396] n.
[3] Cole on Ejectment, p. 2.
[4] See Chap. XX.
[5] 1 Story's Eq. Jur. § 56 and note.

chusetts.[1] The commissioners[2] even assert that "the action of ejectment has never been in use" in that State "for the trial of titles."

§ 75. — But the adoption of the intricate system of real actions as practiced in England was wholly impracticable. The sources of information available to the colonists concerning the practice were few and imperfect; many of the real writs were wholly unsuited to try the titles by which the colonial lands were held, and few of the early settlers possessed the critical skill and precision in practice which the successful management of the writs exacted.[3] Mistakes and vexatious delays were consequently not infrequent. The colonists were not, however, "bigoted to legal forms." They abruptly departed from the ancient precedents (intentionally, however, rather than from ignorance, as the result shows) and introduced a loose and irregular system of pleading in real writs, altering and adapting the process and writs so as to satisfy the needs and requirements of settlers in a new country. The English system of real actions was transplanted into the colonies practically divested of aid prayers, vouchers, protections, parol demurrers, and essoins, the cumbersome appendages which destroyed it in England. Hence we have in our jurisprudence the remarkable anomaly of a system of feudal remedies which the mother country abandoned as outgrown, impracticable and useless, "rooted in soils that never felt the fabric of the feudal system."

§ 76. — The attempt was made to retain what was valuable and useful of the system and to reject what was useless and pernicious.[4] The ancient process and forms were very little regarded, and all real actions were called by the gen-

[1] Stearns on Real Actions (2nd ed. 1831), p. 352 [396].

[2] Report of the Commissioners to Revise the General Statutes of Mass., Part 3, p. 154. But see Hodgkins *v.* Price, 137 Mass. 15.

[3] We do not intend to imply that American lawyers did not become familiar with real writs. The following cases among others attest the skill that was early acquired in this branch of law in the new world. Green *v.* Liter, 8 Cranch, 229: Green *v.* Watkins, 7 Wheat. 27; Inglis *v.* Trustees of Sailor's Snug Harbor, 3 Peters, 133; Barker *v.* Salmon, 2 Met. (Mass.) 32; St. Croix *v.* Sands, 1 Johns. (N. Y.) 328; Swift *v.* Livingstone, 2 Johns. Cas. (N. Y.), 112; Frost *v.* Cloutman, 7 N. H. 9.

[4] Stearns on Real Actions (2d ed.), p. 92 [97].

eral name of actions of ejectment.[1] Little or no distinction was made either in the declaration or the pleadings between the different writs of entry, or between possessory writs and the writ of right.[2]

§ 77. — Though this loose and irregular practice was undoubtedly the cause of many mistakes which the colonists made in determining the rights of litigants, yet had they clung to the established forms, and sought to apply, in their practice, the mass of ancient learning relating to real writs, the system would necessarily have become as vexatious, oppressive, and unpopular as in England.

§ 78. — The feeling in England toward the system of real actions is reflected in the report of the English real property commissioners, in which they conclude that "it would have been beneficial to the community if real actions had been abolished from the time when the modern action of ejectment was devised."[3]

§ 79. — *Modern changes.* — Statutory real actions in various forms are employed in Maine and New Hampshire. A writ of entry, *sur disseizin*, was recognized as a proper form of action in the latter State.[4] Writs of right and of formedon have been swept away in Massachusetts and a statutory writ of entry adopted as the remedy for trying titles in that State. The final judgment rendered on this statutory writ is a complete bar to a writ of right for the same lands subsequently prosecuted in the federal courts.[5] The common law remedy of ejectment for the recovery of a term, though rarely used, has never been abolished in that commonwealth.[6] The entire system of real actions is superseded in New York by a statutory action of ejectment. In Rhode Island any party having a right of entry may bring

[1] Jackson on Real Actions, p. 194. Prof. Pomeroy says of our modern statutory ejectment that "it does not bear the slightest resemblance to the action of 'ejectment' as that was contrived by the old judges and lawyers, and only confusion and misconception result from applying to it that name." Pomeroy's Remedies, etc., § 294.

[2] Jackson on Real Actions, p. 162.

[3] Report of English Real Property Commissioners, Vol. 1, p. 42.

[4] Potter *v.* Baker, 19 N. H. 166.

[5] Derby *v.* Jacques, 1 Cliff. 425.

[6] Hodgkins *v.* Price, 137 Mass. 13; Fay *v.* Taft, 12 Cush. (Mass.) 448; Merrill *v.* Bullock, 105 Mass. 493.

ejectment.[1] In Connecticut the writ of *disseizin* is not a fictitious remedy, and is the only real action known to their law, and comprehends "all the actions in England, by writ of right, writ of entry and ejectment, with all the multifarious divisions into which they are branched."[2] In California they have technically "no action of ejectment." There is said to be as much propriety in calling the action in that State "a writ of entry or an assize, as an ejectment."[3] In Virginia writs of right, of entry, and of formedon, have been abolished, and ejectment, as reformed and corrected by statute, retained. In that State, as in New York and West Virginia, the statutory ejectment may be maintained in the same cases in which a writ of right could have been brought. A controversy over a title in West Virginia, in which the parties proceeded by a writ of right, was decided in 1868,[4] but the system of real actions has, since that date, been superseded in that State by statutory ejectment. The influence of the old system is occasionally reflected in the opinions of our courts, and exerts some effect in framing legislative changes in our remedial law, but the general system, with most of its peculiarities, is obsolete.

§ 80. — *Trespass to try title.* — Injuries affecting real property are chiefly of two classes. First. Those that divest the owner of the possession, and usurp his right of dominion over the property. Secondly. Those that injure the land, or diminish its value, or disturb or impair the owner's enjoyment of it, without divesting the possession. Trespass, waste and nuisance are examples of the latter class. The former injury, which is attended with amotion from or deprivation of possession, is denominated an ouster, and has been defined to be "a wrongful dispossession or exclusion of a party from real property, who is entitled to the possession."[5] This elementary principle must not be overlooked

[1] McCann *v.* Rathbone, 8 R. I. 297.
[2] Crandall *v.* Gallup, 12 Conn. 371.
[3] Caperton *v.* Schmidt, 26 Cal. 479, 496.
[4] Genin *v.* Ingersoll, 2 W. Va. 558.
[5] Newell *v.* Woodruff, 30 Conn. 497. See Field *v.* Hawley, 126 Mass. 327; Towle *v.* Ayer, 8 N. H. 57; Smith *v.* Burtis, 6 Johns. (N. Y.) 217. See § 93.

in considering the form of remedy for the trial of title to land which will next be noticed.

§ 81. — Trespass to try title was substituted for ejectment in South Carolina as early as 1791.[1] It was in form an action of trespass *quare clausum fregit*, except that a notice was indorsed upon the writ to the effect that the action was brought to try the title as well as for damages. This remedy was subject to the principles of law relating to ejectment which, down to that time, had been the action for trying titles to land in that State.[2] There were, of course, no fictions in this new action, and the names of the real parties appeared as plaintiff and defendant.[3]

§ 82. — The plaintiff was compelled to prove a trespass committed by the defendant no matter how trifling. A bare threat made on a rock, the title to which was in controversy, to prevent the plaintiff from fishing there; or obstructing a canoe from landing upon it, was said to be enough evidence to support the action.[4] Even the cutting or blazing of a tree was held sufficient.[5] The judgment was in form for damages, but the plaintiff, if successful, was entitled to a writ *habere facias possessionem*. The reader will at once discover, aside from the question of ouster, the close resemblance this form of procedure bore to ejectment both in its nature and uses.[6]

§ 83. — Manifestly trespass *quare clausum fregit* was a form of action calculated to redress injuries to real property not amounting to an ouster. This remedy as enlarged by statute in South Carolina under the name of trespass to try title usurped the functions and subserved the purposes of a real action. While evidence of a slight trespass would suffice to raise a controversy over the title, yet mesne profits could not be recovered of the defendant if no actual eviction took place, but only a technical trespass was proved.

[1] Stat. at Large, S. C. vol. V, p. 170; since repealed. See Chapter 147, Revised Statutes, 1873, p. 801.
[2] Kennedy *v.* Campbell, 2 Const. Rep. (S. C.) 760.
[3] Lynch *v.* Withers, 2 Bay (S. C.), 115-119, *in notis*.
[4] Massey *v.* Trantham, 2 Bay (S. C.), 421; Underwood *v.* Sims, 2 Bailey (S. C.), Law, 81.
[5] Spigener *v.* Cooner, 3 Rich. (S. C.), Law, 301.
[6] See §§ 15, 19, 39, 40.

§ 84. — The result achieved by the use of fictions in ejectment in England, after many years of effort, was accomplished summarily in South Carolina by a simple statutory enactment. Why the English Parliament and the legislatures of other States of our Union did not enact statutes somewhat similar in character, substituting ouster for trespass, and at a single stroke demolish real writs and the fictions in ejectment is a mystery.

§ 85. — The Legislature of South Carolina solemnly resolved,[1] as a justification for the change, that "since the disuse of real actions, the common method of trying the title to lands has been by action of ejectment, which, depending upon a variety of legal fictions, is rarely understood but by professors of the law." Still, the name of the new remedy, and the practice requiring proof of a trespass, which certainly had no logical or necessary connection with the trial of the title, occasioned some confusion.

§ 86. — The writ of right was never employed in South Carolina,[2] and the profession seem to have shunned the whole system of real actions. If the "variety of legal fictions" in ejectment was incomprehensible to the profession in South Carolina, it is certainly easily understood why no effort was made to utilize real writs.

§ 87. — Trespass to try title has at length been swept away in South Carolina, and an action for the recovery of real property substituted in its stead.[3]

. . . . . .

The essential principles governing real actions, ejectment, and trespass to try title, are uniform in this country as to the interests for which the actions will lie, the titles that will support them, the pleadings, evidence,[4] defences, judgments, writs of possession, and new trials. They constitute practically one general method of procedure disguised under a variety of names. For this reason cases decided under the different systems will generally be cited side by side in this treatise.

[1] Stat. at Large, S. C. vol. V, p. 170, § 4.
[2] Frost *ads.* Brown, 2 Bay (S. C.), 133-144.
[3] Revised Statutes South Carolina (ed. 1873), p. 586; Ibid, chap. 147, p. 801. [4] Greenl. on Ev. vol. 2, § 303, p. 286.

70. THE GAGE OF LAND IN MEDIÆVAL ENGLAND[1]

By Harold Dexter Hazeltine[2]

ECONOMIC and legal development in England is, in certain of its grand outlines, strikingly illustrated by the history of forms of security on property. One sees in England the gradual advance from a natural to a money and

[1] This Essay was first published in the Harvard Law Review (1903-4), vol. XVII, pp. 549-557, vol. XVIII, pp. 36-50.

Note: The author regrets that, owing to pressure of other work, he has not had time to revise and recast the present essay. He desires therefore to mention the fact that in his more recently published *Geschichte des englischen Pfandrechts* he has adopted a terminology slightly different from that employed in his *Englisches Mobiliarpfandrecht im Mittelalter* and in the present essay. Instead of classifying the various forms of security on property under the headings "*usufruct-gage (Nutzpfand)*" and "*property-gage (Proprietaetspfand)*" the author has in his later work grouped the various species of gage under the generic names "*usufruct-gage (Nutzpfand)*" and "*substance-gage (Substanzpfand)*." Under "substance-gage (Substanzpfand)" the author has included all forms of security where the *res* itself, as distinguished from the mere rents and profits arising from the *res*, is to be viewed as gaged for the debt. The term "*substance-gage (Substanzpfand)*" corresponds therefore to the term "property-gage (*Proprietaetspfand*)" as the latter term was employed in the earlier essays. In the *Geschichte des englischen Pfandrechts* the term "*property-gage (Proprietaetspfand)*" has been restricted to forms of security where there is a conditional conveyance of the proprietary right as distinct, for example, from forms where the creditor is given a mere power of sale.

[2] Reader in English Law in the University of Cambridge, since 1907; Lecturer in Law at Emmanuel College, Cambridge, since 1906, and Fellow of Emmanuel College, since 1908. A. B. Brown University, 1894; LL. B. Harvard University, 1898; J. U. D., Berlin University, 1905; Hon. M. A., Cambridge University, 1906. Lecturer in the Law School of the University of Chicago, 1906. Professor of Law in the University of Wisconsin, 1908.

Other Publications: Appeals from Colonial Courts to the King in Council (Proceedings of the American Historical Association), 1894; Englisches Mobiliarpfandrecht im Mittelalter (Sonderabdruck aus der Festgabe für Hübler), Berlin, 1905; Zur Geschichte der Eheschliessung nach angelsächsischem Recht. Berlin, 1905; The Exchequer of the Jews (Law Quarterly Review, XVIII, pp. 305 *et seq.*), 1906; Die Geschichte

credit economy, the progress from the rural and agricultural life of Anglo-Saxon times to the town and national life, with its industry and its commerce, of the centuries that follow the coming of the Danes and the Normans. A heathen and tribal society gives way to Christian and to feudal institutions; and at the same time there is early developed a strong kingship, a strong central government, that is to influence in a masterful way the course of economic and legal history down to our own day. Acting as a check on the growth of local custom and of feudal justice, and making the towns subserve its own economic purposes, this powerful central government has its foreign and commercial policy and its system of Common Law and Equity, with the good right arm of judicial execution to enforce the decrees of its courts.

Unless we err, the English law of gage, like the law of other Germanic countries, starts from the conception, in the Anglo-Saxon days of barter and self-help, that the *wed* or *vadium* delivered to the gagee is a provisional satisfaction, a provisional payment, a redeemable forfeit. The *res* and the claim are regarded as equivalent; and, should the gagor not redeem, the gagee must look exclusively to the *res* for satisfaction. The gagee has no personal action against the gagor; and the gagor, should he fail to redeem the *res*, has no right to the surplus, if the *res* be worth more than the amount of the gagee's claim. This forfeit-idea is the original idea underlying the *wed*, and this conception persists. In course of time, with the development of credit and of judicial execution, of varieties of obligation and of forms of action for their enforcement, there branch off two other ideas: (1) the idea that a *res* of trifling value may be given as a binding contractual form,[1] and this at length develops in the English ecclesiastical courts into the formal contract by pledge of faith; and (2) the idea that, if the

des englischen Pfandrechts (No. 92 in Gierke's Untersuchungen zur deutschen Staats- und Rechtsgeschichte, Breslau), 1907; Notice of an Early Year-Book MS. (James, Descriptive Catalogue of the Manuscripts in the Library of Gonville and Caius College, Vol. II, Cambridge, 1908); Early History of Specific Performance of Contract in English Law (Festgabe für Kohler, Stuttgart, 1909).

[1] *Cf.* Thayer, Evidence at the Common Law 393.

res be of substantial value, it is merely a collateral security to a personal claim, the gagee being entitled to sue the gagor personally and the gagor having a right to call the gagee to account for the surplus.[1] Along with this transformation of the primitive forfeit notion into the idea of collateral security there is another line of development that must be most carefully distinguished therefrom. Inasmuch as the early gage transaction is merely a provisional payment, the property right of the gagee on default lacks the *Auflassung*, the quit-claim, the final abandonment of all right in the *res* that is in Germanic law necessary to a complete and absolute title. The gagee cures this defect by going into court and getting the court to declare his title absolute; and, later, by getting the gagor in advance to put a *resignatio*-clause in the deed itself. By such a clause, however, the gagee evades the obligation that the law has at length imposed upon him of returning the surplus; and the law enters and forbids this evasion.[2]

It lies beyond the scope of the present paper to prove, by a discussion of English texts, that this has been the course followed by our own law. Keeping in mind, however, the outlines of this general Germanic development, we wish merely to distinguish as clearly as possible the various forms assumed by the English medieval gage of land. A consideration of the many difficult questions connected with the law of securities on land, not only in its historical development, but also in its present-day application to concrete cases that come before the courts, will, it is believed, be ren-

[1] On *Schuld* and *Haftung* compare von Amira, Nordgermanisches Obligationenrecht (Altschwedisches Obligationenrecht [1882]) 22-42, and (Westnordisches Obligationenrecht [1895]) 56 *et seq.*; 2 Brinz, Pandekten (1879) 1 *et seq.* See also 1 Chironi, Trattato dei privilegi, delle ipoteche e del pegno (1894) 1 *et seq.*

[2] For the details of this view of the Germanic development in general, but without a consideration of the English texts, see 2 Heusler, Institutionen des deutschen Privatrechts 128-153, 225-250; Wigmore, The Pledge-Idea, 10 Harv. L. Rev. 321-341 (citing, in his discussion of the historical significance of the "release" and "quit-claim," Professor Ames' essays on Disseisin, 3 Harv. L. Rev. 23, 313, 327, unfortunately not accessible to the present writer during the preparation of this article). Compare also Wigmore, The Pledge-Idea, 11 Harv. L. Rev. 29.

dered all the easier by such a preliminary survey, rapid and inadequate though it be.

It helps to make the various medieval forms stand out sharply, if we group them into gages with immediate possession of the creditor, and gages with possession of the debtor until default; and this is indeed but the fundamental distinction that underlies the *fiducia* or the *pignus* and the *hypotheca* of Roman law,[1] the *aeltere Satzung* and the *juengere Satzung* of German law,[2] the *engagement* and the *obligation* of French law.[3]

Then, looking at execution or the enforcement of the security, we may make several further distinctions. If we adopt for the moment — and it will tend to clearness — the terminology of German legal science, we may classify English forms of security on land with immediate possession of the creditor as usufruct-gage (*Nutzpfand*) and as property-gage (*Proprietaetspfand*). In forms of usufruct-gage the creditor has merely a right to take the rents and profits. In forms of property-gage the *res* itself, either by forfeiture or by sale, may be made to answer the claim of the creditor; if by forfeiture, whatever the value of the land may be, we may call the security a forfeiture-gage (*Verfallspfand*), and if by sale, with a return of the surplus proceeds to the debtor, the security may be designated as a sale-gage (*Verkaufspfand*). There may indeed be combinations of the usufruct-gage and the property-gage; and every property-gage with immediate possession of the creditor necessarily involves a temporary usufruct-gage, a right to take the rents and profits until the debtor's default.[4] Speaking now only for the English medieval law, we believe that gages where the debtor remains in possession until default may also be classified, according to this same principle, as usufruct-

[1] See 1 Dernburg, Pfandrecht 1-95.

[2] See von Meibom, Das deutsche Pfandrecht; Brunner, Grundzüge der deutschen Rechtsgeschichte 188-191.

[3] See Franken, Das französische Pfandrecht im Mittelalter 1-36; Viollet, Histoire du droit civil français (1893) 733-748.

[4] On the medieval law on the continent see especially Franken, Das französische Pfandrecht im Mittelalter 207, 208; and Brunner, Grundzüge der deutschen Rechtsgeschichte 188-191. Compare also Beauchet, Histoire de la propriété foncière en Suède (1904) 424 *et seq.*

gage and as property-gage. In other words, whether the creditor take possession immediately or only on the debtor's default, what the debtor has in reality gaged are either the rents and profits of the land or the property, the *res*, itself. Finally, from these forms of security proper, where the creditor's claim may be satisfied, in one way or another, out of the gaged land, we may sharply distinguish cases where all the right the creditor has is to hold the land as a distress, as a *simplex namium*, as a means of bringing compulsion to bear on the debtor; for here the creditor has no right to take the fruits of the land and no right to obtain the land itself, either on the principle of forfeiture or of sale. Let us first examine briefly the gage with immediate possession of the creditor and then pass on to the gage with possession of the debtor.

I

Forms of security on land with immediate possession of the creditor are, then, either usufruct-gage or property-gage; or, indeed, combinations of the two.

Both the usufruct-gage and the property-gage are found in the law of the Anglo-Saxon period;[1] but it is with the law of the centuries succeeding the Norman Conquest that we are here concerned.

The usufruct-gage assumes two forms, the form depending upon the use that is made of the rents and profits taken by the gagee while the land is held by him. The transaction is a *vivum vadium* if the parties agree that the rents and profits shall reduce the debt. The transaction is called a *mortuum vadium* if, on the other hand, the rents and profits do not reduce the debt itself, but are taken in lieu of interest.[2]

Glanvill states positively that the *vivum vadium* is a valid

[1] See Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194-198; Kohler, Pfandrechtliche Forschungen 95, 96. Compare Lodge, The Anglo-Saxon Land Law (Essays in Anglo-Saxon Law 106, 107).

[2] Glanvill, X. 6, 8. Compare 1 Robbins, Law of Mortgages (1897) 1-5; Fisher, Law of Mortgage (1897) 4-7; 3 Gray, Cases on Property 411, n. 1. The English *vivum vadium* corresponds, therefore, to the German *Todsatzung* and the English *mortuum vadium* to the German *Zinssatzung*.

transaction; and apparently he means also that the king's court enforces the terms of the *mortuum vadium*. The Christian creditor, however, commits a sin in entering into a contract of *mortuum vadium* because it is a sort of usury; and if he dies before the contract comes to an end, he dies as a sinner and his chattels are forfeited to the king. To all seeming the *mortuum vadium*, sinful though it be, is the usual contract of the thirteenth century both for Christian and for Jew alike.[1]

From the usufruct-gage proper must be distinguished the so-called "beneficial lease," a lease for years purchased outright for a sum of money. This latter transaction serves in the twelfth and thirteenth centuries two important economic ends: It provides the lessor with ready money, and it provides also a form of investment of capital that enables the lessee to speculate on the return of his money with interest out of the profits of the land. There is here no gage in the sense of a security for some personal claim, because there is no debt. For the same reason there is no usury, and in an age when usury is a sin and when the goods of the usurer who dies in his sins are forfeited to the king, the beneficial lease is popular. The one who invests his money in a beneficial lease has too the termor's possessory protection; and at the end of the term the land goes back to the lessor.[2]

Coke discusses the *vivum vadium* of his day as a form of security where "neither money nor land dieth, or is lost";[3] and in modern law the principle of the usufruct-gage underlies the "Welsh mortgage" and "securities in the nature of Welsh mortgages." In these modern gages the fruits of the land may be taken in lieu of interest only or in reduction of both principal and interest.[4]

[1] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law (1898) 119. The principle of the *vivum vadium* is found in Madox, Formulare, No. CXLII. Compare Round, Ancient Charters, No. 56.

[2] 2 Pollock and Maitland, Hist. Eng. Law 111, 112, 117, 121, 122. Compare the *Rentenkauf* of the German Middle Ages. 1 Heusler, Institutionen des deutschen Privatrechts 338, 355, 375, 2 *idem* 150-153.

[3] Co. Lit. 205*a*.

[4] See 1 Robbins, Law of Mortgages (1897) 1-31; Pollock, Land Laws (1896) 133.

The property gage of the Middle Ages is forfeiture-gage. It assumes two main forms: (1) either the gagee who is given immediate possession must wait until default of the debtor before he can acquire proprietary right; or, (2) the gagee is given proprietary right at once, though under the condition that, if the debt be paid at a certain day, the proprietary right of the gagee shall then come to an end. In either case default of the debtor results in immediate or ultimate forfeiture of the gaged land itself, whatever may be its value, in satisfaction of the debt.

The first of these two varieties of the forfeiture-gage seems to be the usual form in the days of Glanvill and Bracton.

Glanvill, in the tenth book of his treatise, is apparently discussing several forms of gage and combinations of these forms. The usufruct-gage may be *vivum vadium* or *mortuum vadium;* but to such a transaction there may be added the possibility that the land itself be forfeited.

The gage may be given for a term, and in such a case the parties may or may not include a clause of forfeiture in their contract. If they include such a clause, this express bargain must be strictly adhered to; this bargain being that, if at the end of the fixed term the debtor do not pay his debt, the gaged land shall then become at once the property of the creditor, to be disposed of as he wishes.[1] Here no judgment of the court is necessary. By operation of the clause of forfeiture, the gagee becomes suddenly seised in fee, with the freeholder's rights and remedies. On the other hand, the contract may contain no such clause of forfeiture; and here the creditor must go into court and there must be certain legal proceedings before the gaged land can be forfeited to him for the debt. These proceedings are as follows: When the debtor fails to pay at the end of the term, the creditor must sue him. The debtor is then compelled to appear in court in answer to a writ ordering him to "acquit" or redeem the gage. Once in court the debtor will either confess or deny the fact of gaging the

[1] Glanvill, X. 6. See also 1 Spence, Equitable Jurisdiction (1846) 600, 601; Chaplin, Story of Mortgage Law, 4 Harv. L. Rev. 8; 2 Pollock and Maitland, Hist. Eng. Law 120.

land for the debt. If he confess it, he has thus, says Glanvill, confessed the debt itself; and he is ordered by the court to redeem the gage within a "reasonable" time by payment of the debt, the court at the same time declaring that, in case of default in payment at the end of this new period, the gaged thing itself shall become the property of the gagee and thus forfeited for the debt. Should, however, the debtor deny the gage for the debt, he may then acknowledge that the land in question is his property and offer some excuse for its being in the possession of the other party. Should he confess in court that the land is not his property, the creditor is at once allowed by the court to dispose of it as his own. If the debtor assert that the property in question is his own, but deny both the gage and the debt, the creditor must then prove both the debt and the gage of the specific property in dispute for this debt.[1]

If now the gage be given indefinitely or without a term, the creditor may at any time demand the debt. Apparently this means that the creditor can at any time go into court and get a judgment ordering the debtor to redeem within some fixed and reasonable period; the court at the same time declaring that, if the debtor fail to do this, the creditor may do anything he pleases with the gaged land, that is, that the land will on default be forfeited.[2]

Unless, therefore, the parties stipulate that the gage shall be a pure usufruct-gage, we see that, whether the gage be for a term or without a term, and whether the contract contain the forfeiture-clause or not, the gaged land may be forfeited for the debt; the gage thus assuming the form of property-gage.

The possession of the gagee is called *seisina*, a *seisina ut de vadio*, but it is quite unprotected by any legal remedy. The gagor remains seised of his freehold, and, should some

[1] Glanvill, X. 6-8. On the burden of proof see Chaplin, Story of Mortgage Law, 4 Harv. L. Rev. 9.

[2] Glanvill, X. 8; 2 Pollock and Maitland, Hist. Eng. Law 120. On the equitable nature of certain features of this procedure in the king's court and their similarity to the "equity of redemption" and "decree of foreclosure" in the courts of equity at a later day, see Chaplin, Story of Mortgage Law, 4 Harv. L. Rev. 9, 10; 2 Pollock and Maitland, Hist. Eng. Law 120.

third person unjustly turn the gagee out of the land, it is the gagor who has the right to bring the possessory action of Novel Disseisin. The gagor, not the gagee, has indeed been disseised. Furthermore, if the gagor himself eject the gagee, the latter still has no remedy by which he can recover possession.[1]

Glanvill explains this by saying that what the creditor really has a right to is not the land, but the debt itself; and that, if ejected by the gagor, the gagee should bring an action of Debt, the court compelling the debtor to make satisfaction. This argument is, however, unsatisfactory; and the real reason why the gagee is not given possessory protection is to be sought elsewhere. As pointed out by Pollock and Maitland, the king's justices in the time of Glanvill are experimenting with the new possessory actions. They are agreed that the freeholder shall have the assize of Novel Disseisin; but they are not quite sure whether the gagee really and truly has a *seisina* that calls for protection. Influenced perhaps by theories of the Italian glossators as to possessory protection, they end in refusing the gagee a remedy.[2]

As soon as the debt be discharged or payment properly tendered, the gagee is under the duty of giving up possession to the gagor; and, should the gagee maliciously retain possession, the gagor may summon him into court by writ. If it be determined that the land is held as a gage and not in fee, it must be given up to the gagor.[3]

The creditor may enforce his personal claim by bringing the action of Debt. His right to the gage on default may be enforced by the foreclosure procedure we have just discussed.[4]

To all seeming the Glanvillian gage soon becomes obsolete owing to the failure of the king's court to protect the gagee's *seisina ut de vadio;* and indeed the attempt to treat the gagee's rights in the land as rights of a peculiar nature is

[1] Glanvill, X. 11, XIII. 28, 29; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See further Chaplin, Story of Mortgage Law, 4 Harv. L. Rev. 6, 7.

[2] Glanvill, X. 11; 2 Pollock and Maitland, Hist. Eng. Law 120, 121. See Bracton, f. 268.

[3] Glanvill, X. 6, 8-10, XIII. 26-30.

[4] Glanvill, X. 6-8, 11, 12.

soon given up, the gagee being now given some place among the tenants.[1]

In the age of Bracton the popular form of gage is a lease for years to the creditor, under the condition that, if the debt be not paid at the end of the term, the creditor shall hold the land in fee. During the term the gagee has the *possessio* or *seisina* of a termor, and this possession is protected by writ. On default of the debtor the fee shifts at once and without process of law to the creditor; the fee, the land itself, is thus forfeited for the debt.[2] Here we have a form of the property-gage very much like the Glanvillian gage for a term with clause of forfeiture; and indeed the chief difference is the protection thrown about the creditor's possession in the later form.

This early form of the property-gage, the gage of Glanvil and Bracton, is not, however, to be the basis of the later law. Legal theory of later times does not tolerate this thirteenth-century method of allowing a term for years, a "chattel real," to grow into a "freehold estate" on the mere fulfilment of a condition.[3] Indeed, the classical gage of English law is not a conveyance on condition precedent, but a conveyance on condition subsequent, the *mortuum vadium* or *mortgage* that is expounded by Littleton and the judges of the later common law.

This later form of gage is a conditional feoffment; the condition being one for redemption and defeasance on a specified day. The creditor acquires at once an estate in fee, though this freehold estate is subject to the condition. If the debt be paid on the day, the feoffor, that is, the debtor, or his heirs may re-enter; if not, the freehold estate of the feoffee, the creditor, is entirely freed from the condition, thereby becoming absolute.[4] In other words, the gage of

[1] 2 Pollock and Maitland, Hist. Eng. Law 120, 121.

[2] Bracton, f. 20, 268, 269; 3 Britton XV, §§ 2-7; Bracton's Note Book, pl. 889; Madox, Formulare, No. DIX; Cart. Guisborough 144; 2 Pollock and Maitland, Hist. Eng. Law 122. See also Round, Ancient Charters, No. 56; 1 Chron. de Melsa 303; Madox, Formulare, No. CCIII; Y. B. 21-22 Ed. I. pp. 125, 222-224.

[3] See Littleton, §§ 349, 350; Co. Lit. 216-218; 2 Pollock and Maitland, Hist. Eng. Law 122, 123.

[4] See Bracton's Note Book, pl. 458; Y. B. 20-21 Ed. I. p. 422; Y. B. 30-31 Ed. I. pp. 208-212; Madox, Formulare, Nos. DLX-DLXII,

the later common law is a property-gage, a form of forfeiture-gage; and at the same time there is combined with this forfeiture-gage a temporary usufruct-gage in the nature of the Glanvillian *mortuum vadium*, the rents and profits taken by the mortgagee in possession until the day of payment not going in reduction of the debt.[1]

Though the writers of the twelfth and thirteenth centuries do not discuss this form of the property-gage, probably because it falls under the general theory of conditional gifts, it is nevertheless found in the sources of the law long before the time of Littleton,[2] and its history seems indeed to reach back to a distant past.[3] Its transformation in modern times will be adverted to subsequently.

II

The English gage of land with possession of the debtor until default is to all seeming developed later than the gage with immediate possession of the creditor; the origin of this later form of security for loans being directly connected with the history of the process of judicial execution.[4]

DLXIX, DLXXIX; Littleton, §§ 332-344. According to modern practice in England the mortgage takes the form of an absolute conveyance to the mortgagee, with an agreement on his part to reconvey when the loan is paid. See Ames, Specific Performance, 17 Harv. L. Rev. 174.

An example of the mortgage for years will be found in Madox, Formulare, No. DLXXXIX. In this later form of gage for a term default results, not in forfeiture of the fee, as in the time of Bracton, but simply in forfeiture of the term. See note (1) to Co. Lit. 205 a.

[1] Franken, Französisches Pfandrecht 162, 163.

[2] See the authorities cited in note 4, p. 655.

[3] On a similar form of conditional conveyance for purposes of security in the Anglo-Saxon period see Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde 194-198.

[4] Franken, Das französische Pfandrecht im Mittelalter 7, and Brunner, Grundzüge der deutschen Rechtsgeschichte 189, 190, take this view as to the Germanic law on the Continent. 2 Heusler, Institutionen des deutschen Privatrechts 135, 143-150, maintains that both the gage with and the gage without the creditor's possession appear equally early in old German law, and that indeed there is no direct connection between judicial execution and the origin of the gage with debtor's possession. For views of other legal scholars see 2 Heusler, Institutionen 144, and Wigmore, The Pledge-Idea, 10 Harv. L. Rev. 341-350. Although the present writer alone is responsible for views held in this paper, he wishes to express indebtedness to his friends Professor Gierke and Dr. Neubecker, of the University of Berlin, for suggestions as to the nafure of the gage with possession of the debtor, more especially the German *Hypothek*.

Before, however, taking up this phase of the development, we wish to tarry a moment in the realm of medieval "charges," "liens," "burdens" and "encumbrances" on land that are created for purposes other than the securing of debts owing to creditors. Here, in certain instances at least, a right *in rem* is created in favor of one who does not take immediate possession of the burdened land; but different opinions may perhaps be held as to whether in such cases there is really a gage of land in the sense of a security for a personal claim. Thus, for instance, the warranty of title to land conveyed may create a charge on other land remaining in the hands of the warrantor, and the endowment of the wife at the door of the church may create a charge on all the land of the husband. In such cases, should the feoffee be ousted or should the husband die in the lifetime of the wife, the land previously bound by the warranty or by the endowment may be followed into the hands of third persons and made to answer the claim of the feoffee or the widow. To give immediate possession of the burdened land to the feoffee or the wife would be needless and indeed without meaning; the creation of the charge, the right *in rem*, is all that is necessary.[1]

In the medieval period warranty is the obligation of defending the title to land conveyed, and, should the defense fail, of giving to the evicted owner other land of equal value in exchange, an *excambium ad valentiam;*[2] the warranty being generally enforced by voucher or by the writ of *warantia cartae*, sometimes it would seem by writ of Covenant.[3] Besides the warranty binding only the warrantor and his heirs, warranty may in the thirteenth century create also, as we have just stated, a charge or lien on other lands remaining in the hands of the warrantor that is enforceable against the whole world. In the words of Bracton: Non

[1] For the German law see 2 Heusler, Institutionen 135, 147, 148.

[2] See Glanvill, III.; Bracton, f. 257b-261b, 380-399b; Beames, notes to Glanvill, III., Beale's edition; Holmes, Common Law 372; 1 Gray, Cases on Property 416-419. Compare 2 Brunner, Deutsche Rechtsgeschichte 516; 2 Pollock and Maitland, Hist. Eng. Law 663.

[3] See Bracton, f. 399, and 2 Pollock and Maitland, Hist. Eng. Law 218, n. 4, 664. Compare Rawle, Covenants for Title, 5th ed., 12, 16.

solum obligatur persona feoffatoris . . . , poterit etiam tenementum obligari cum persona tacite vel expresse.[1]

This lien or charge, this *obligatio rei*,[2] may arise, therefore, out of an express warranty or out of a tacit warranty. An express warranty binds a certain designated tenement.[3] A tacit warranty implied in a feoffment binds, says Bracton, all the other lands that the feoffor has on the day of the feoffment.[4] That the feoffee of the warrantor acquires a right *in rem* is shown by the fact that land bound by warranty passes to everyone with the charge. The land is bound in the hands of the warrantor's heirs. It may be followed into the hands of assigns, and even into the hands of the king and the chief lord, who has it as an escheat. Should the warranty fail and should the burdened land be called for to answer the claim of the warrantor's feoffee, every possessor must give up the land.[5]

In the legal literature of the twelfth and thirteenth centuries the *dos* is represented as a gift from the bridegroom to the bride *ad ostium ecclesiae*[6] at the time of the marriage ceremony, and yet as a gift which the law compels the bridegroom to make.[7] The gift may take the form of a dower of certain definite lands, but never more than a third

[1] Bracton, f. 382. In the later Middle Ages a mere warranty would not bind the other lands of the warrantor in whatsoever hands they might come. To create a lien on the land it was necessary to bring an action of *warantia cartae* and get a judgment *pro loco et tempore*. See Rawle, Covenants for Title, 5th ed., 12, 13.

[2] See Bracton, f. 382, 388b, and the thirteenth-century annotations to Bracton's Note Book, pl. 748.

[3] Bracton, f. 382; Bracton's Note Book, pl. 748, and thirteenth-century annotations; Y. B. 20-21, Ed. I., pp. 359-361. See Maitland, Bracton's Note Book, pl. 748, note 7.

[4] Bracton, f. 382, 382b, 388, 388b; Bracton's Note Book, pl. 748, thirteenth-century annotations.

[5] See Bracton, f. 380-382b, 388, 388b; Bracton's Note Book, pl. 638, 748, 1024; Fleta, lib. VI. c. 23, § 17; Maitland, Bracton's Note Book, pl. 748, note 7; Holmes, Common Law 394, 395. Holmes, Common Law 395: "Fleta writes that every possessor will be held. There cannot be a doubt that a disseisor would have been bound equally with one whose possession was lawful." The various writs will be found very fully collected in Bracton, f. 380-399b.

[6] The endowment is at the door of the church to insure publicity and solemnity. See Coke on Littleton 34a; Beames, Translation of Glanville, Beale's ed. 94, n. 2; 2 Pollock and Maitland, Hist. Eng. Law 374, 375.

[7] Compare Co. Lit. 30b, 31a.

of all the lands of the husband; and in this form the dower is called a *dos nominata.*[1] A *dos rationabilis*, on the other hand, is in the twelfth century the dower of a third of all land in the freehold seisin of the husband on the day of the nuptials; and, when the husband fails to give a *dos nominata*, it is assumed by the law that he wishes to give a *dos rationabilis.*[2] In the time of Britton the wife has a right, in the case of a *dos rationabilis*, to a third of all the lands in the seisin of the husband during his entire life;[3] and this is the rule of the common law.[4]

In the time of Bracton the wife seems to acquire at once, by the giving of a *dos nominata*, "true proprietary rights" in the lands. Unless she has joined with her husband in the levying of a final concord before the king's justices, she is entitled, on his death, to recover the very land designated from any one who now has it in his hands. If the tenant be sued by the woman, he will vouch the heir of the husband. The heir will probably be obliged to warrant the gift of his ancestor, and, should he fail in this, he must give the evicted tenant a compensation in value out of other lands of the ancestor. This, however, does not concern the wife at all. Her right is to the land named by her husband and she can evict the tenant.[5]

If one-third of the land that the feoffee holds under the feoffment from the husband be claimed by the widow as *dos rationabilis*, and if the feoffee vouch the heir to warranty, the widow must see that the heir appears in court, for the heir is also the warrantor of her dower. If it be confessed by the heir that sufficient other lands have come to him to endow the widow, the feoffee will be allowed to

[1] In the later Middle Ages the *dos nominata* may be more than a third of all the lands. See Littleton, §§ 37, 39; 2 Pollock and Maitland, Hist. Eng. Law 421, 425, 426. Compare Co. Lit. 33b.

[2] Glanvill, VI. 1, 2, 17; Bracton, f. 92; 1 Reeves, Hist. Eng. Law 155, 156; 2 Pollock and Maitland, Hist. Eng. Law 420, 421, 425.

[3] 1 Nichols, Britton, pp. xli, xlii, and 2 *idem* 238, 242; 2 Pollock and Maitland, Hist. Eng. Law 421.

[4] Littleton, § 37; Co. Lit. 33b. Compare 2 Reeves, Hist. Eng. Law 577-579.

[5] Bracton, f. 299b; 2 Pollock and Maitland, Hist. Eng. Law 422, 423. On the legal nature of the wife's right in the land before the husband's death, compare Bracton, f. 300b; Beames, Translation of Glanville, Beale's ed., 97, n. 3. See Glanvill, VI. 3.

keep his land and the widow will be given a judgment against the heir. Should, however, the heir have no other lands, then the widow can recover a third of the land held by the feoffee. The feoffee will get judgment against the heir; and, on the death of the woman, the feoffee will get back the land that the widow has been holding as dower. As expressed by Pollock and Maitland: "The unspecified dower is therefore treated as a charge on all the husband's lands, a charge that ought to be satisfied primarily out of those lands which descend to the heir, but yet one that can be enforced, if need be, against the husband's feoffees." [1]

Again, it is not uninstructive to observe that feudal services and rents-service are in the medieval law a "charge" or "burden" on the land held by the tenant. [2] Should the tenant make default, the lord may not only distrain the chattels that are on the encumbered land, but he may reach the land itself. The tenement may be forfeited to the lord; or, the lord may enter into possession and reduce his claim out of the fruits of the land; or, he may enter and hold the land as a mere distress, with no right to keep it as a forfeiture and with no right to satisfy himself out of the profits. [3]

By the feudal law failure of the tenant to perform the services results in a forfeiture of the land; but only after the tenant has been adequately warned and after judgment of the lord's court. If the tenant be summoned three times without responding, the feudal law enables the court to put the lord into possession for a year. Should the tenant redeem within the year, possession is restored to him; but should he not redeem, he loses the land. [4]

[1] Bracton, f. 300; 2 Pollock and Maitland, Hist. Eng. Law 423, 426. For the writs of the dowager see Glanvill, VI.; Bracton, f. 296-317b; 2 Britton, liv. V., c. IV.-XIII.

[2] See, for instance, Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I. c. 21; 1 Britton, liv. II. c. XVIII, § 10; Holmes, Common Law 388. Similar in its effect is the so-called *Abmeierungsrecht* in the case of the German *Erbpacht* and the *emphyteusis* of Roman law and the German common law. Compare also von Amira, Das Altnorwegische Vollstreckungsverfahren (1874) 314 *et seq.*

[3] Note, further, the special significance of the rent-charge in the English medieval period. Compare 2 Heusler, Institutionen 150-153.

[4] See 2 Chron. Abingd. 128; Wright, Tenures 197-199; Gilbert, Rents 3, 4; Robinson, Gavelkind 195; 2 Reeves, Hist. Eng. Law 186; 1 Pol-

Forfeiture may also be enforced by writ of *cessavit per biennium*, introduced by statute in the reign of Edward I. If the tenant fail to perform his services or pay his rent for two years, and if there be insufficient chattels for a distraint, the lord may obtain a writ of *cessavit* out of chancery. This writ enables the lord, if the tenant still fail to redeem by tendering his arrears and damages before judgment, to recover the land or fee itself in demesne. The land thus adjudged to the lord is forfeited for ever, for the tenant has now no right to redeem.[1]

What practically amounts to forfeiture is also found in the Kentish custom of *gavelet*. If the tenant of land held in gavelkind falls into arrears with his services and rents, the lord is to get permission of his own Three-Weeks-Court to distrain the chattels of his tenant found upon the tenement; and the lord in thus seeking to distrain is to be accompanied by good witnesses. This attempt to distrain is to be continued for four sessions of this court of the lord, and if before the fourth court sufficient chattels cannot be found, the court then awards that the lord may take the tenement into his hands *en noun de destresse ausi cum boef ou vache*. The lord may keep the land in his hands a year and a day, but without fertilizing it; and within this period the tenant may, if he pay his arrears and make reasonable amends for the withholding, enter once more into his land. If, however, the tenant do not thus redeem, the lord may then make all the proceedings public at the next county court, and in the session of his own court following this public declaration it is finally awarded that the lord may enter into the tenement and cultivate it, taking the profits as in his own demesne (*si come en son demeyne*).[2]

lock and Maitland, Hist. Eng. Law 354. See also Placita Ang.-Norm. 97.

[1] See Stat. Glouc., 6 Ed. I. c. 4; Stat. West. II, 13 Ed. I., c. 21; F. N. B. f. 208 H, 209, 210 A.; Coke, 2 Inst. 295, 400, 460; 3 Blackstone c. 15, § I; Co. Lit. 47a, n. 4; Co. Lit. 142a, n. 2; Co. Lit. 143b, n. 5; Booth, Real Actions 133-135; Wright, Tenures 202; Robinson, Gavelkind 193-195; 1 Pollock and Maitland, Hist. Eng. Law, 353.

[2] *Consuetudines Cantiae*, 1 Statutes of the Realm 224a, 225; Lambarde, Perambulation of Kent 498, 499, 526-528; 2 Reeves, Hist. Eng. Law 186, 187; Robinson, Gavelkind 195, 196. Compare Co. Lit. 142a, n. 2.

If now the tenant comes after this award of the lord's court and wants to get back the tenement, thus treating the whole transaction as in effect a mere pledge *quousque*, he is obliged, before this can be done, to perform the services and pay the rent, and must in addition make proper amends to the lord for the withholding of the services or rent.[1]

The copies of the custumal differ, however, as to just what amends the tenant must make, a good deal depending apparently upon an old Kentish by-word printed in the custumal; and owing, it would seem, to this uncertainty as to the proper reading of this by-word, it has always been a mooted question whether the Kentish *gavelet* was intended as a continuing security, with a right of redemption even after adjudication to the lord, or whether there was an absolute forfeiture. According to the generally accepted reading of the by-word, the tenant seems to have a theoretical right to redeem by paying the arrears nine — or eighteen? — times over, and in addition a wergild of £5. As legal scholars have pointed out, this is practically an impossible condition, and there is in reality a forfeiture of the tenement, though the ancient law in its forbearance is loath to say so.[2]

Our sources leave us in no doubt, however, that in London the medieval procedure by *gavelet* may result in absolute forfeiture. According to the Statute of Gavelet,[3] usually attributed to the tenth year of Edward II.'s reign, if the rents be in arrear, the lord shall first distrain all the chattels on the land, and then, if these be insufficient, he may begin proceedings in *gavelet* by a writ *de consuetudinibus et servitiis*. If the tenant deny the fact that he owes services or rents, the lord must then prove in court by witnesses that he is seised of the services or rents now in arrear; and if this be proved, the lord shall then recover

[1] *Consuetudines Cantiae*, 1 Statutes of the Realm 225; Lambarde, Perambulation 528; Robinson, Gavelkind 196.

[2] For details as to this question see *De Wandlesworth's Case*, reported in Robinson, Gavelkind 197; 1 Statutes of the Realm 225, n. 1; Lambarde, Perambulation 449; Robinson, Gavelkind 196-202; 1 Pollock and Maitland, Hist. Eng. Law 355, n. 1. Compare 2 *idem* 591-593.

[3] *Statutum de Gaveleto in London*, 1 Statutes of the Realm, 222; Robinson, Gavelkind 194; Co. Lit. 142a, n. 2; 2 Reeves, Hist. Eng. Law 186, 187.

his tenement in demesne by judgment of court. If, however, the tenant acknowledge the services or rents and the arrears, then by judgment of court the arrears shall be doubled, and the tenant must also pay a fine to the sheriff for the wrongful withholding of the rents. If the tenant do not come, after due summons, to render the doubled arrears and to pay the fine, either because he is unwilling or unable to make satisfaction, the land shall be delivered to the lord by the court to be kept in his hands for a year and a day. Within this period the tenant may redeem his land by rendering the doubled arrears and paying the fine. But if he fail thus to redeem within the year and day, the land shall then by judgment of court be forfeited to the lord for good and all. The land shall then be called *forschoke*, because, for default in the services, it shall remain to the lord for ever in demesne.[1]

The common law will not allow forfeiture of the land for default of the tenant in performing his services or paying his rent; to effect a forfeiture it is necessary to introduce from the Roman system the writ of *cessavit per biennium*, which we have just adverted to. All that the king's court in the days of Glanvill and Bracton will permit is a *simplex namium* of the land. The lord must first distrain the chattels of the tenant; and only after this has been done may the lord get a judgment from his seignorial court permitting him to distrain the tenant by his land. By virtue of this judgment the lord is able to seize the land and to hold it as a *simplex namium*, as a means, that is, of compelling the tenant to render the arrears. The lord cannot obtain the land as a forfeiture, and he has even no right to take the profits. The tenant retains his right to redeem; and whenever he is willing and able to satisfy the claim of the lord, the lord must give back the land.[2]

[1] Cowel, Interpreter (1727), *s. v. Foreschoke:* "*Foreschoke* (*Direlictum*) signifies originally as much as *forsaken* in our modern language."

[2] Glanvill, IX, 8; Bracton, f. 205b, 217, 218; Bracton's Note Book, pl. 2, 270, 348, 370; Wright, Tenures 199-201; Co. Lit. 142a, n. 2; 1 Pollock and Maitland, Hist. Eng. Law 352-355. Compare Gilbert, Rents 3, 4. It is true that feoffors and feoffees may expressly agree that, on default, the feoffor may by re-entry get back the land; but

In the law set forth by Littleton and Coke it is sometimes possible for the one entitled to rent to satisfy his claim out of the profits of the land: thus, where a feoffment is made reserving a certain rent, upon the condition that, if the rent be in arrear, the feoffor or his heir may enter and hold the land until he be satisfied or paid the arrears. In this case, says Coke, "when the feoffor is satisfied either by perception of the profits or by payment or tender and refusall or partly by the one and partly by the other, the feoffee may re-enter into the land." [1]

The history of gages to secure loans, where the debtor remains in possession of the gaged land until default, begins with the coming in of the Jews and of foreign merchants from Italy and other countries. In the centuries that immediately follow the Norman Conquest it is English policy to foster industry and commerce. Foreigners are induced to visit the realm, and it is sought to make up for deficiencies in English production by bringing in the goods of other countries. Systems of banking and insurance take root. In the interest of creditors new and more efficient processes of judicial execution are established. The Exchequer of the Jews is set up as a branch of the Great Exchequer. A system of registering debts owing to Jewish creditors and the gages that secure them is perfected, this system allowing a free buying and selling of Jewish obligations and efficient execution on default.[2] The needs of other creditors are supplied by giving them, on judgments or enrolled recognizances of debt, new writs of execution in addition to the old common law writs of *fieri facias* and *levari facias*; these new writs enabling the creditor to reach the lands and chattels and body of the debtor. The writ of *elegit* is introduced

such agreements are, before the middle of the thirteenth century, very rare indeed. 1 Pollock and Maitland, Hist. Eng. Law 352.

[1] Lit. § 327; Co. Lit. 202b, 203a. See Co. Lit. 205a, and marginal note (d).

[2] See, further, 3 Hoveden 266, 267; Bracton, f. 13, 386b; 2 Blackstone, c. 20; Plowden, Usury 95-98; Horwood, Y. B. 32-33 Ed. I., pp. xli, xlii; Jacobs, Jews of Angevin England; Gross, Exch. of the Jews (printed in 1 Publications of Anglo-Jewish Hist. Exhibition); 1 Pollock and Maitland, Hist. Eng. Law 468-475, 2 *idem* 123, 124; Rigg, Jewish Exch. (Seld. Soc.) ix-lxii; Hazeltine, Exch. of the Jews, 18 L. Quart. Rev. 305-309.

by the Statute of Westminster the Second for creditors generally. Merchant creditors, if they get their debtors to make recognizances of debt before courts of record or certain public officials, may obtain, on the default of their debtors, even more effective remedy. Merchant creditors may reach, among other things, not only half the land, as under the Statute of Westminster the Second, but all the land of the debtor. These merchant securities are known as "statutes merchant" and "statutes staple," the former being introduced by the Statute of Acton Burnel and the Statute of Merchants in the reign of Edward I., the latter by the Statute of the Staple under Edward III. The advantages of the merchant securities are given to all creditors by the Statute 23 Henry VIII., introducing the security known as a "recognizance *in the nature of a statute staple.*"[1]

A gage of land with possession of the debtor to secure money obligations is therefore rendered necessary and possible by this development of credit and of processes of judicial execution; and, very largely for the benefit of the mercantile classes, an hypothecation of land may now, in the later Middle Ages, be created by judgment and by the registration or enrolment of contracts under seal. The publicity essential to this form of gage is thereby obtained; but it should be well observed that the new security breaks in upon the old law with its restraints on alienation and its require-

[1] See, further, preambles to Stat. Act. Burnel, 11 Ed. I., and Stat. Merchant, 13 Ed. I.; Coke, 2 Inst. 677-680, 4 Inst. 237, 238; Bac. Abr. tit. Execution; Comyn, Digest, tit. Obligation (K); Wright, Tenures 170-171; 2 Blackstone, c. 10, § V, c. 20, § 2, 3 *idem* c. 26, § 5, 4 *idem* c. 33, § III; 2 Reeves, Hist. Eng. Law 71, 72, 276-279, 3 *idem* 289; Coote, Mortgage, 2 ed., 66; Rogers, Indus. and Com. Hist. Eng. (1892) 71, 72; Cunningham, Eng. Indus. and Com. during Early and Middle Ages, (1896) 222, n. 3, 281-283, 290, 316, 317; Cunningham and McArthur, Eng. Indus. Hist.; 2 Pollock and Maitland, Hist. Eng. Law 203, 204, 596, 597; Brodhurst, Merchants of the Staple, 17 L. Quart. Rev. 62-74; Carter, Eng. Legal Institutions (1902) 250-270.

The forms of gage described by Glanvill and Bracton seem to be, as we have already explained, securities with immediate possession of the creditor. For the view that the gage with possession of the debtor may be found in these writers, see, however, 2 Phillips, Eng. Reichs- und Rechtsgeschichte 239, 240; 2 Glasson, Histoire du droit et des institutions de l'Angleterre 313-316; Chaplin, Story of Mortgage Law, 4 Harv. L. Rev. 6 *et seq.*

ment that livery of seisin is necessary to the conveyance of rights in land. The old feudal polity is attacked and attacked successfully by commercialism.

The gage of lands and tenements to Jewish creditors who do not take possession arises, then, on the registration of a written contract under seal before public officials at the Jewish Exchequer or in certain towns.[1]

To secure principal and interest the debtor may thus hypothecate certain specific lands;[2] and lands of any tenure are chargeable until the year 1234, when the Crown's demesne estates held in socage or villeinage are exempted.[3]

On the other hand, the gage is often in terms a gage of all the debtor's property, movable and immovable. Sometimes indeed the debtor says that, should he make default, all his goods, movable and immovable, may be distrained.[4] Apparently all such recognizances or bonds create, as regards movable property, merely a right to distrain the chattels that are in the hands of the debtor, not an hypothecation or right *in rem* that enables the creditor to follow the chattels into the hands of third persons.[5] We have evidence, however, that the gaging of land to Jews by registered contract gives rise to a right *in rem* for purposes of security. If the alienee of land bound by the debt refuse to pay the debt with interest, the *seisina* of the land in his hands will be given to the Jew.[6]

[1] See on this system of *archae* and *rotuli* the authorities cited in n. 2, p. 664, *supra*. Compare Rigg, Jewish Exch. (Seld. Soc.), pp. xiii, xxxvii, 136 (*s. v. stallare*). On the enrolment of documents in the Great Exchequer see 1 Hall, Red Book of Exchequer, pp. xix-xxxv.

[2] See Jacobs, Jews 57, 66, 67, 70-72, 99, 215, 216, 220, 221, 234; Jewish Exch. (Seld. Soc.) 45. On the gaging of rents and chirographs of debt see Jacobs 99; Jewish Exch. (Seld. Soc.) 28, 29, 33, 34, 43-45.

[3] Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

[4] See Jewish Exch. (Seld. Soc.) p. xix, n. 1, 33, 34, 92-94, 102; Webb, Question, App. Nos. 19, 30, 31. See further Jewish Exch. (Seld. Soc.) 67, 68, 91, 93.

[5] The Jewish gage of chattels seems to be a gage with immediate possession of creditor. See an article by the present writer entitled The Exchequer of the Jews, 18 L. Quart. Rev. 308. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xiii.

[6] See the cases in Jewish Exch. (Seld. Soc.) 18, 63; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221; 1 Madox, Hist. Exch. 233, n. (y). Compare the case of *De Sawston* v. *De Senlis*, Jewish Exch. (Seld. Soc.) 53. The alienee may, however, vouch his warrantor. See the case in Jewish Exch. (Seld. Soc.) 63.

On default in payment the creditor may bring his action of Debt; and execution will be by summary processes.[1] If his security on the land be enforced, the creditor will be given *seisina* by the court.[2] He may either sell the lands after possession for a year and day, in which time the debtor has a chance to redeem;[3] or, he may hold the lands until he has satisfied himself out of the rents and profits.[4]

While the land is in his hands the creditor has not feudal seisin, not the *seisina* of one in the scale of lords and tenants, but *seisina ut de vadio*, seisin as a gagee;[5] and this seisin of the Jew or of his assignee is protected by the courts.[6]

From the sources that have come under our notice, it is not clear whether the right of sale given by the charters of Richard I. and John indicates that the land is at the end of the year and day completely forfeited to the creditor, his title to the land being perfected by the acquiring of this right of sale, or whether the creditor is obliged to account

[1] Our sources are full of actions of Debt. See, *e. g.*, Tovey, Anglia Judaica 42, 43, 50; Prynne, Demurrer, part 2, p. 11; Cole, Documents of 13th and 14th Centuries 285-332; Jewish Exch. (Seld. Soc.), *s. v.* Debt.

The process of execution laid down by *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221, 221a, is very much like that under the Stat. West. II, c. 18.

[2] See Jacobs, Jews 57, 90, 231 (and compare 233), 234; Webb, Question, App. No. 4; Bracton's Note Book, pl. 301; Plac. Abb. (Rec. Com.) p. 58; "Exchequer Receipt Roll, 1185" (with preface by Hubert Hall) 31; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221a; Goldschmidt, Geschichte der Juden in England 69, n. 37; Jewish Exch. (Seld. Soc.) pp. xiii, xxxviii, n. 1, 63, and Index *s. v.* Seisin. Compare Rigg, Jewish Exch. (Seld. Soc.) p. xxxv. Similarly, the assignee of the Jewish creditor may obtain *seisina* of the gaged land *per praeceptum Domini Regis*. See Webb, Question, App. No. 6.

[3] 1 Foedera 51 (see Jacobs, Jews 134-138); 1 Rotuli Chartarum, ed. Hardy, 93 (see also Tovey, Ang. Jud. 62-64, and Jacobs, Jews 212-214); Goldschmidt, Juden in England 21, 22; Rigg, Jewish Exch. (Seld. Soc.) xiii. See Webb, Question, App. No. 14. Richard I.'s *Carta qud plurimae libertates Judeis conceduntur & confirmantur* (1190), 1 Foedera 51: Et liceat predictis Judeis quiete vendere vadia sua, postquam certum erit illos ipsa per unum annum integrum & unum diem tenuisse.

[4] See Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1, lvii, 19-27, 43-45, 89-91; *Chapitles Tuchaunz La Gyuerie*, Jewish Exch. (Seld. Soc.) lvi; *Les Estatutes de la Jeuerie*, 1 Stats. of Realm 221a; Jacobs, Jews 233.

[5] See Jacobs, Jews 231; Webb, Question, App. Nos. 4, 6; Rigg, Jewish Exch. (Seld. Soc.) xiii, xxxviii, n. 1.

[6] See Plac. Abb. (Rec. Com.) 64, 82, 175; Bracton's Note Book, pl. 301, 1825; Jacobs, Jews 191, 234; Webb, Question, App. No. 6.

[7] Compare 2 Pollock and Maitland, Hist. Eng. Law 90-92; Wigmore, The Pledge-Idea, 10 Harv. L. Rev. 335. Sometimes, by collusion with

to the debtor for the proceeds of the sale over and above the amount of the debt and interest. The answer may lurk in records of the Jewish Exchequer that are still unprinted. In the thirteenth century one would certainly expect to find an accounting in cases of sale, quite as much as in cases where the creditor is reducing his claim by taking the profits of the land.

If indeed the creditor satisfy himself out of the rents and profits, he holds the land as a *vivum vadium*. The debtor may call upon the creditor to account by the action of Account; and if the creditor has taken more than his debt and interest, this surplus belongs to the debtor. If the land be freehold, the creditor is impeachable for waste, and apparently no laches or lapse of time is pleadable in bar to an action of Account.[1]

The gage of land with possession of debtor to creditors other than Jews arises on judgment or on the enrolment of recognizances of debt before courts of record or before properly authorized public officials of towns, staples, and fairs. The judgment or recognizance under the Statute of Westminster the Second binds lands belonging to the debtor at the time of the judgment or the recognizance and also, according to later law, lands that he afterwards acquires; though with the writ of *elegit*, until recent times, only a moiety of the lands may be taken from the debtor or from one who has purchased the charged land from the debtor. Under the Statute of Merchants and the other acts already referred to, the enrolled "statute" or recognizance, accompanied by the drawing up of a sealed obligation, binds in its earlier history all the lands owned by the debtor at the time of making the recognizance; and, according to later law, lands subsequently acquired by the debtor are also charged by recognizance.[2]

powerful personages, it was contrived to defer the redemption indefinitely, "thus compassing by sharp practice what we now call foreclosure." Rigg, Jewish Exch. (Seld. Soc.) xxxvii.

[1] See n. 4, p. 667. The Jews were expelled from England in 1290.

[2] See Stat. Acton Burnel, 11 Ed. I.; Stat. Merc. 13 Ed. I.; Stat. West. II, 13 Ed. I., c. 18; Stat. 5 Ed. II., c. 33; 14 Ed. III., Stat. 1, c. 11; Stat. Staple, 27 Ed. III., Stat. 2, c. 9; Stat. 36 Ed. III., c. 7; Stat. 10 Hen. VI., c. 1; Stat. 23 Hen. VIII., c. 6; Stat. 32 Hen. VIII.,

On default in payment the creditor may bring his action of Debt on the personal obligation.[1] If, however, advantage be taken of the special remedies on the recognizance or "statute," possession of land bound by the lien — whether the land be now in the hands of the debtor himself, the debtor's heir who is of age or the debtor's feoffee — is delivered to the creditor, his personal representatives or assigns, to be held until the amount of the claim is levied from the rents and profits or paid outright, or until the debtor's interest in the land expires.[2]

In the enforcement of the lien, therefore, the creditor holds the land as a "gage" in the nature of the *vivum vadium*.[3] The acts and the writs framed upon them state that the creditor holds or is seised of the land *en noun de frank tenement, ut liberum tenementum;* at the same time giving him, his executor, administrator, or assign, the freeholder's possessory actions of Novel Disseisin and Redis-

c. 5; Stat. 2 & 3 Ed. VI., c. 31; Reg. Brev. f. 146-153, 299; Viner, Abr. *tit.* Stats. Merchants &c.; Bac. Abr. *tit.* Execution (B); 1 Ro. Abr. 311, 892; 2 Ro. Abr. 466, 472, 473; Bro. Abr. *tit.* Stat. Merc. & Stat. Staple; F. N. B. f. 266, 267 D.; Coke, 2 Inst. 395, 396, 679; Co. Lit. 289b, 290a; Wright, Tenures 170, 171; 2 Lilly, Pract. Reg. 658, 659; 2 Blackstone, c. 10, § IV., V.; 2 *idem* c. 20, 3 *idem* c. 26, § 4, 4 *idem* c. 33, § III.; Co. Lit. 191a, n. VI. 9; 2 Tidd, Practice 1101, 1102; 2 Wms. Saunders, 197, n. (a), 199, n. (c), 208, n. (u), 217, n. (3), 218, n. (c); 2 Reeves, Hist. Eng. Law 96, 97, 3 *idem* 289; Williams, Real Prop. 262, 263, 266, 283, 284, 371, 372, 407, 408. On the modern law see Coote, Mortgage, 2nd ed., 68, 72, 82, 83; Williams, Real Prop. 261 *et seq.*

Quite in the spirit of the medieval law it seems that chattels, though liable in the hands of the debtor on a "statute merchant" or "statute staple," cannot be followed into the hands of purchasers. See 2 Ro. Abr. 472; Bac. Abr. *tit.* Execution (B).

[1] See Stat. Merc. 13 Ed. I.; Stat. 23 Hen. VIII., c. 6; F. N. B. f. 122 D; Viner, Abr. *tit.* Stat. Merc. &c.; Bro. Abr. *tit.* Stat. Marc. &c.; Bac. Abr. *tit.* Execution (B). As to a "statute staple" see, however, Viner, Abr. *tit.* Stat. Merc. &c.; 2 Lilly, Pract. Reg. 659.

[2] Stat. West. II, c. 18; Stat. Merc. 13 Ed. I.; Stat. Staple, 27 Ed. III., c. 9; Y. B. 15 Ed. III., 327; Y. B. 15 Hen. VII., 16; Y. B. 2 Rich. III., 8; Y. B. 17 Ed. III., 3; Reg. Brev. f. 299; F. N. B. f. 130-132, 266 A.; F. N. B. 8 ed. 304, n. (a); 1 Ro. Abr. 311; 2 Ro. Abr. 472-475, 478; Bro. Abr. *tit.* Stat. Marc., pl. 16, 43, 49, 50; Viner, Abr. *tit.* Stat. Merc. &c.; Bac. Abr. *tit.* Execution (B); Coke, 2 Inst. 395, 396, 471, 678-680; Co. Lit. 290a; 2 Blackstone c. 10, § 5, 3 *idem* c. 26, § 4; 2 Wms. Saunders, 220, n. (3), 221, n. (3), 260, n. (6); 2 Tidd, Prac. 1083, 1084; Wms., Real Prop. 268. Compare Wms., Real Prop. 281, 282. On the judgment creditor's right of sale in modern law see Wms., Real Prop. 268.

[3] See Coke, 2 Inst. 679, note; 2 Blackstone c. 10, § IV.

seisin. Indeed, the Statute of the Staple explicitly declares that the merchant creditor is actually to have an "estate of freehold" (*estat de franktenement*). In legal literature the creditor in possession is referred to as a "tenant by statute," and it is said that he has an "estate by statute," a "conditional estate," an "estate defeasible on condition subsequent." [1] Notwithstanding all this, however, the exact legal nature of the creditor's interest in the land has not yet been fully stated.

One might be inclined to think at first sight that the intention of the medieval legislator was actually to give the creditor an estate of freehold; and from the uncertainty of the holding, which was in reality *quousque*, it would seem perhaps that these "estates by statute" ought, in strict legal theory, to have been treated as freehold estates.[2] The law stopped short of this, however. The acts were interpreted to mean that the creditor has not a "freehold estate" descendible to the heir, but a "chattel real" going to the personal representative on the creditor's death.[3] In the quaint language of Lord Coke, the *ut* of the expression *ut liberum tenementum* is merely "similitudinary," the tenant by statute having a "similitude of a freehold, but *nullum simile est idem*." [4]

The creditor's interest in the land being thus regarded by the law as a chattel real protected at the same time by the possessory actions of the freeholder, the commercial classes, for whose benefit these securities were chiefly introduced, gained thereby two very significant advantages. The holding of the creditor, his personal representatives or assignees, was perfectly secure; for, if ousted from the land, their seisin might be recovered by an assize.[5] Again,

[1] See Reg. Brev. f. 299; Rastell, Entries, 543, 545; F. N. B. f. 178 G, 189 I; 2 Ro. Abr. 475; Coke, 2 Inst. 396; 2 Blackstone c. 10, § IV., V., 3 *idem* c. 26, § 4; 2 Wms. Saunders 203, n. (1); Wms., Real. Prop. 268.

[2] See Butler's note to Co. Lit. 208a; Leake, Digest 205. Compare F. N. B. f. 178 G.

[3] 28 Ass. pl. 7; F. N. B. f. 178; Coke, 2 Inst. 396; Co. Lit. 42a, 43b; 4 Co. 82a, *Corbet's Case;* 2 Blackstone ch. 10, § V.; Butler's note to Co. Lit. 208a; Leake, Digest 205.

[4] Co. Lit. 43b.

[5] Compare Savigny's theory as to the gagee's "derived possession" (*abgeleiteter Besitz*). For the literature and a criticism of the theory

on the creditor's death, not only the debt but its security thus went to the creditor's executor, not to his heir; the law, says Blackstone, "judging it reasonable, from a principle of natural equity, that the security and remedy should be vested in them, to whom the debts if recovered would belong." [1]

The creditor in possession has, therefore, the freeholder's possessory actions; but at the same time the debtor remains seised of his freehold estate, and should the creditor be ousted, the debtor too may bring his assize of Novel Disseisin, for he has thus been disseised of his free tenement. As soon, however, as either the debtor or the creditor recovers possession, the writ of the other shall abate.[2]

As soon as the amount of the creditor's claim is either levied by the creditor out of the rents and profits or paid outright by the debtor, the debtor or the feoffee of the debtor is again entitled to the land now freed from the lien.[3] It seems that in certain very rare cases the conusor has a right of re-entry. The usual method of regaining possession, however, is by bringing a writ of *scire facias;* and by a special form of this writ the conusee may be compelled to restore the issues over and above the sum due.[4]

The medieval gage of land with possession of the debtor until default is, accordingly, either a gage of certain specific lands or a gage of all the lands of the debtor, the security being created by a contract under seal and of record.[5]

see 1 Dernburg, Pandekten (1900) § 172. See also 2 Puchta, Institutionen (1893) § 229; 3 Dernburg, Das bürgerliche Recht (1904) § 10.

[1] See Stat. Merc. 13 Ed. I.; F. N. B. f. 130, 131; Co. Lit. 43b; 2 Blackstone, ch. 10, § V.; Butler's note to Co. Lit. 208a. In Butler's note to Co. Lit. 208a these principles as to the nature of the tenant by statute's interest in the land are compared with the rules of Equity in regard to the classical mortgage by conditional feoffment.

[2] F. N. B., 8th ed. 412, n. (e), citing 12 Hen. 6, 4.

[3] See Stat. Merc. 13 Ed. I.; Coke, 2 Inst. 396, 678, 679; and authorities cited in n. 2, p. 668, *supra.*

[4] See Coke, 2 Inst. 679, note; Viner, Abr. *tit.* Stat. Merc. &c. On the doctrine of Equity as to an accounting by the conusee, see Shep. Touch. 357, n. (i).

Williams, Real Property (1901) 226, n. (e): "Statutes merchant and staple, and recognizances in the nature of a statute staple were modes of charging lands with the payment of a debt under certain statutes, which, having long been obsolete, were repealed in 1863."

[5] One of the most significant features of the modern development is the transformation of the old mortgage of Littleton and the classi-

Looking at execution or the enforcement of the gage on default, we may, furthermore, classify such securities as usufruct-gage and as property-gage. The creditor may reduce his claim out of the rents and profits only; or he may be entitled to the *res* itself. The principle of the usufruct-gage underlies both gages to Jews and securities created by "statutes" or recognizances. In the right of sale given to Jewish creditors one may see the principle of the property-gage, although whether this right of sale indicates merely that the land is forfeited, or whether, on sale, the surplus must be given to the debtor, is not clear. It is, furthermore, worth observing that, should the debtor's interest in the land expire while the land is in the hands of the creditor under a "statute," there is really a forfeiture of the debtor's interest.

It will be seen, therefore, that whether the medieval creditor take immediate possession or only on default of the debtor, the principle is the same. In either case the security is a usufruct-gage or it is a property-gage, or it is indeed a combination of the two. Though the tracing of the development down to our own day lies beyond the scope of the present paper, it is believed that this very same conception lies at the basis of much of the modern English law.[1]

cal common law into a form of security where the debtor usually remains in possession until default and where, instead of foreclosure, the mortgaged land may under certain circumstances be sold, either under a power of sale or by order of the court, the surplus going to the debtor. See, further, Franken, Französisches Pfandrecht, 8, 9, 164-170; 5 Glasson, Histoire du droit et des institutions de l'Angleterre, 485; 6 *idem* 385-406; Williams, Real Property (1901) 527-559.

[1] In modern German law it is possible to satisfy the claim of the creditor out of the fruits of the land (*Zwangsverwaltung*) or out of the substance of the *res* itself (*Zwangsversteigerung*). See *Das Reichsgesetz über die Zwangsversteigerung und Zwangsverwaltung* of March 24, 1897, revised May 20, 1898.

71. CHANGES IN THE ENGLISH LAW OF REAL PROPERTY DURING THE NINETEENTH CENTURY [1]

By Arthur Underhill [2]

THE two lectures which have been allotted to me cannot compete in point of interest with any of those entrusted to my colleagues. The subject is of the earth, earthy. It has not the tragic and human element of criminal law, nor the political flavour of Constitutional or International law. Mr. Blake Odgers and Mr. Birrell have, doubtless, had to struggle with unpromising subjects, but I have neither their charm of style nor their wit to assist me.

Moreover, the law of Real Property is still in a transition state, and most of the changes that have been made (with the exception of Lord Cairns's Settled Land Acts and Lord Halsbury's Land Transfer Act) are of the somewhat tinkering and patchy character so dear to the British Parliament. However, although the subject is not amusing, I will endeavour, as Lord Bacon sententiously puts it, "rather to excite your judgment briefly than to inform it tediously."

Now, although numerous changes have been made in the law affecting real estate during the past century, the most important may be broadly reduced to nine classes, viz., those relating to (1) settled land, (2) the capacity of persons under disability, (3) the effect of death on real estate,

[1] This Essay was first published in A Century of Law Reform, 1901 (London: MacMillan & Co.), cc. IX, X, pp. 280-340.

[2] Barrister of Lincoln's Inn. M. A. Dublin University, LL. D. 1881; sometime Reader of the Law of Property in the Inns of Court; one of the six Conveyancing Council to the High Court of Justice, 1905.

Other Publications: A Summary of the Law of Torts, 1873, 8th ed. 1905; A Treatise on the Law of Private Trusts, 1878, 6th ed. 1904; Principles of the Law of Partnership, 1899, 2d ed. 1906; Principles of the Interpretation of Wills and Settlements, 1900, 2d ed. 1906 (with Mr. Strahan); General Editor of the Encyclopedia of Forms and Precedents, 16 vols., 1902-1905.

(4) the acquisition of title by long enjoyment, (5) copyholds and commons, (6) landlord and tenant, (7) the law of tithes, (8) the relation of legal and equitable rights, and, lastly, (9) changes in the forms by which property is made to pass from owner to owner — in other words, changes in the practice of Conveyancing.

I propose to commence with the most important of all, viz.,

(1) *Changes in the Law of Settled Land*

Land can be settled either by deed or will. Moreover, it can be settled in divers ways. People of moderate fortune usually settle land in trust for sale on the death of the first life tenant, the proceeds being divided among his children; or, instead of providing for its sale, they divide the property itself among the children. No essential change has been made in that form of settlement. But there is another and much more important form of settlement of land which has for its object the exact converse of the first. Instead of providing for an equal division of the land (or the proceeds of its sale) among a class of children, it aims at keeping the property intact as long as possible in the settlor's line of descendants, one male at a time having the exclusive possession of it during his life, and the eldest son of the settlor and the male heirs of his body being preferred to the younger sons and their male issue. Such a form of settlement is called strict settlement. It rests on two foundations — primogeniture and estates for life. If primogeniture and the creation of life estates were forbidden, strict settlements would inevitably fall to the ground. As things stand, it is not too much to say that nearly all the great estates, comprising perhaps the greater part of the land of England, are held in strict settlement.

I have heard it said that a great Conveyancer of a past generation once annoyed the judges of the Common Pleas by commencing an argument with the definition of an estate in fee simple. Possibly some of you may feel equally annoyed with me if I venture to give a popular sketch of a strict settlement. But if some sages of the law have hon-

oured me with their presence to-night, I expect that there are also some legal babes and sucklings of whom it is necessary to think.

Speaking broadly, then, the general framework of a strict settlement of land is as follows: The settlor conveys it to the use of himself for life, and after his death to the use that his widow may receive a rent charge (or jointure, as it is called). Subject to these life interests he gives it to the use of trustees for a long term of years (500 or 1000) upon trust to raise by mortgage of that term a specified sum of money for the portions of his younger children, and subject thereto to the use of his first and other sons successively and the heirs male of their bodies, with an ultimate remainder, in default of issue, to the settlor himself in fee simple.

It will be seen that, on the face of it, such a settlement merely ties up the property during the settlor's life; for, upon his death his eldest son as first tenant in tail could (formerly by process called a common recovery and now by a simple enrolled deed) convert his estate tail into a fee simple, and by paying the portions of his younger brothers and sisters, make himself the absolute owner of the property.

There is no certain method of avoiding this, because the law does not permit property to be settled by way of remainder on the unborn child of an unborn child,[1] or by way of trust or executory limitation beyond a life or lives in being and twenty-one years afterwards.[2]

In practice, however, the property is rarely permitted to go out of settlement, for directly an eldest son comes of age he is induced, like some latter-day Esau, to sell his birthright for a financial mess of pottage.

The alternative is gently placed before him: do your duty to the family by surrendering your future estate tail, receiving instead a future life estate and a present handsome allowance, or remain during your father's lifetime without funds. Practically, even if family pride did not impel him to consent willingly, he would have to submit, because during his father's lifetime he can only convert his estate tail

[1] *Whitby* v. *Mitchell*, 44 Ch. D. 85.
[2] *Cadell* v. *Palmer:* Tudor's L. C. Conveyancing, 578.

into a "base fee" which is scarcely negotiable for purposes of mortgage. He therefore yields; he and his father disentail the property, and then resettle it, restoring the father's life estate, giving a life estate to the son on the father's death, and an estate in tail male to *his* sons successively. When he marries and *his* eldest son comes of age, the same ingenious process is repeated.

The system of strict settlement, in short, depends upon providing by means of constant resettlements, that no person of full age shall be entitled to a greater estate than an estate for life. This is the keystone of the edifice, and consequently the law of strict settlement is, apart from powers contained in the settlement itself, identical with the law relating to life estates.

Now, with these explanatory remarks let us contrast the state of settled land at the beginning and end of the 19th century.

At the beginning, unless the will or settlement by which the property was settled contained express powers (which was frequently not the case), a tenant for life could neither sell, exchange, nor partition the settled property, however desirable it might be. If the estate consisted of a large tract of poor country, fruitful in dignity but scanty in rent, and especially if the portions of younger children charged on it were heavy, he too often found it a *damnosa hæreditas;* the rents, after payment of interest on the portions, leaving a mere pittance for the unfortunate life tenant to live on, and quite disabling him from making improvements, or even keeping the property in a decent state of repair. Nay, more, if he did spend money in improvements, the money was sunk in the estate to the detriment of his younger children. He could not pull down the mansion house, however old or inconvenient it might be, nor even, strictly, make any substantial alteration in it. Unless expressly made unimpeachable for waste, he could not open new mines.

But in addition to these disabilities, what pressed still more hardly upon him, and on the development of the estate generally, was his inability to make long leases. Consequently where valuable minerals lay beneath a settled prop-

erty, or the growth of the neighbouring town made it ripe for building sites (the rents for which would greatly exceed the agricultural rent) nothing could lawfully be done. The tenant for life could not open mines himself, even if he had the necessary capital for working them; nor, even if unimpeachable for waste, could he grant leases of them to others for a term which would repay the lessees for the necessary expenditure in pits and plant; nor could he grant building leases or sell for building purposes at fee farm rents. In some settlements powers were expressly inserted, enabling the trustees to grant such leases and to sell, exchange, and partition. But frequently, especially in wills, such powers were omitted, and in such cases the only means of doing justice to the land, was to apply for a private Act of Parliament authorising the trustees or the life tenant to sell, exchange, partition, or lease. But such Acts were expensive luxuries, only open to the rich, and beyond the means of most country gentlemen of moderate means. Moreover, even the barring of the entail, in order to make a new or more effectual settlement, necessitated the grotesque and cumbrous proceeding known as a common recovery, a pretended action by a collusive plaintiff against the tenant in tail, for the recovery of the land. The latter pleaded (quite untruly) that he had bought the lands from a man of straw (usually the Crier of the Court) who had warranted the title, and asked that this person should be "vouched to warranty," *i. e.* called on to defend the action. The Crier being called, admitted the warranty, and made default. Thereupon judgment was given that the lands should be given up to the plaintiff, and that the Crier should convey lands of equal value to the tenant in tail under his fictitious warranty, which he was of course incapable of doing. What would have happened if the Crier had subsequently come into a fortune is too painful to contemplate. In some cases a single voucher was deemed sufficient; in others a double voucher was required. In all cases the proceeding was a scandalous farce, in which judges, counsel, solicitors, and the parties, were all behind the scenes and enjoying the fun. It was described by the Attorney General in 1833 as "involving

enormous and unnecessary expense, and necessitating the conduct of proceedings through no less than twenty offices, in each of which danger, delay, and expense had to be faced."

Thus matters stood in the year 1801 and thus they continued down to the year 1833. In those days when agriculture was the most profitable of industries, when machinery and railways and steam navigation had not yet produced any great demand for coal and iron, and when towns did not as now overflow their ancient boundaries with astonishing rapidity, the tying up of land in the way I have described gave rise to but few hardships. Indeed, we find the Real Property Commissioners in 1829 singing a pæan over the system as one approaching perfection. In their first report they say: "Settlements bestow upon the present possessor of an estate, the benefits of ownership and secure the property to his posterity. The existing rule respecting perpetuities has happily hit the medium between the strict entails which prevail in the northern part of the island, and by which the property is for ever abstracted from commerce, and the total prohibition of substitutions, and the excessive restrictions of the power of devising established in some countries on the Continent of Europe. In England families are preserved, and purchasers always find a supply of land in the market." That, however, was too optimistic a view, and even the Commissioners themselves recommended the abolition of the absurd method of barring estates tail by Common Recovery, and the substitution of a simple enrolled deed of conveyance, a recommendation which was carried into effect in 1833 by the Act for the abolition of Fines and Recoveries.[1]

However, even that measure did not pass without opposition, one argument being, I believe, that it would render useless the "lean and wasteful learning" on the subject which was then stored away in the brains of Conveyancing Counsel, a learning which Shakespeare with fine audacity attributes to no less a person than the Prince of Denmark when he says, "This fellow might be in's time a great buyer of land, with his statutes, his recognizances, *his fines*, *his*

[1] 3 and 4 Will. IV. c. 74.

double vouchers, his recoveries: is this the fine of his fines, and the recovery of his recoveries, to have his fine pate full of fine dirt? will his vouchers vouch him no more of his purchasers, and double ones too, than the length and breadth of a pair of indentures?"[1]

Thus matters stood until the early years of the reign of that great and gracious Lady whose loss we are now lamenting. By the Drainage Acts,[2] tenants for life and other limited owners, were empowered, with the leave of the Court of Chancery, to make permanent improvements in the way of drainage, and to charge the expenses with interest on the inheritance.

In 1864 still larger powers of improving land were given to tenants for life, by the Improvement of Land Act[3] of that year, which enables tenants for life with the sanction of the Enclosure Commissioners (now the Board of Agriculture) to raise money by way of rent charge for divers *specified* improvements, including draining, improvement of watercourses, embanking, enclosing, fencing, reclamation of land, the making of roads, tramways, railways, and canals, the cleaning of land, the erection and improvements of cottages and buildings, planting, the construction of piers, and other matters too numerous to mention in detail. To these were added by the Limited Owners Residences Acts, 1870[4] and 1871,[5] and the Limited Owners Reservoir and Water Supply Act, 1877, the erection or completion of, or an addition to a mansion house, and the construction of permanent waterworks.

These Acts were doubtless of great value, but they were of small importance compared with a statute passed in the year 1856 known as an Act to facilitate leases and sales of settled estates.[6] That Act after being amended by a series of statutes was repealed and the whole subject re-enacted in a modified form by the Settled Estates Act, 1877,[7]

[1] *Hamlet*, Act V. sc. 1.
[2] 3 and 4 Vict. c. 55 and 8 and 9 Vict. c. 56.
[3] 27 and 28 Vict. c. 114.
[4] 33 and 34 Vict. c. 56.
[5] 34 and 35 Vict. c. 84.
[6] 19 and 20 Vict. c. 120.
[7] 40 and 41 Vict. c. 18.

usually known to us as "Marten's Act" after its respected author, Sir Alfred Marten, the present Chairman of the Board of Studies of the Council of Legal Education.

The Settled Estates Acts enabled the Court of Chancery to sanction the sale, exchange, or partition of settled land and the granting of leases not exceeding in duration 21 years for an agricultural or occupation lease, 40 years for a mining lease or water-mill or water-way lease, 60 years for a repairing lease, or 99 years for a building lease, unless the Court should be satisfied that it was usual in the district and for the benefit of the property that longer leases should be granted.

They also authorised the tenant for life, without any leave of the Court, to grant leases not exceeding 21 years unless the settlement expressly negatived such power.

The Settled Estates Acts governed the subject between 1856 and 1882. Under them a tenant for life, apart from express power in the settlement, could only sell or lease the settled land for longer than 21 years *under an order of the Court*.

For some time before 1882, an agitation had sprung up for the total prohibition of life estates. The late Mr. Joseph Kay, Q. C., was perhaps the ablest advocate of the reformers, and wrote a very able and interesting book on the subject called *Free Trade in Land*. It was there urged that life estates complicate titles and make transfers difficult and costly; that they take the control of children (particularly an eldest son) out of his father's hands, and prevent "the sale and breaking up of the great estates when change of circumstances, or poverty, or misfortune, or bad management, or immorality would otherwise bring land into the market."

On the other hand, we of a conservative disposition (I say we, for I took an active part in the controversy) pointed out, that if settlements of personal property were allowed, but settlements of land were forbidden, it would be a terrible injustice to landowners. As the late Mr. Osborne Morgan put it, "It is scarcely too much to say, that to a good many people a proposal to abolish marriage

settlements would be little less startling than a proposal to abolish marriage itself. Even grandfathers have their feelings, nor are fathers or husbands always to be trusted; and few country gentlemen would regard with complacency a measure of law reform which might in certain eventualities, consign their daughters or their daughters' offspring to the workhouse or the streets. A law, therefore, which would permit no limitation of land except in fee simple, would render it very difficult for a landowner to make a suitable provision for his family after his death. Under such a law, a country gentleman could not give a life interest nor a jointure to his widow, he could not make a proper provision for the event of one or more of his children dying under age. He could certainly not protect his daughters or their issue against the rapacity or extravagance of an unprincipled or thriftless husband or father. It is easy to see that such a measure, simple as it sounds, would amount to a social revolution; its consequences would be absolutely incalculable."

Under these circumstances some of us urged that instead of rashly abolishing life estates, an extension of powers of management and sale should be granted to life tenants; and this idea having commended itself to the late Earl Cairns and others, including that great real property lawyer, Mr. Wolstenholme, a Bill was drafted by the latter, and safely piloted through Parliament by the former, and is now known as the Settled Land Act, 1882.[1] It is impossible, having regard to the time at my disposal to give more than the merest sketch of the provisions of this great Act, the greatest real property Act, I think, of the century.

The broad policy on which the Act of 1882 is founded, was, in the words of the late Lord Justice Chitty in *Re* Mundy and Roper (reported in 1899, 1 Ch. p. 288), as follows: "The object is to render land a marketable article, notwithstanding the settlement. Its main purpose is the welfare of the land itself, and of all interested therein, including the tenants, and not merely of the persons taking under the settlement. The Act of 1882 had a much wider scope than

[1] 45 and 46 Vict. c. 38.

the Settled Estates Acts. The scheme adopted is to facilitate the striking off from the land of fetters imposed by settlement; and this is accomplished by conferring on tenants for life in possession, and others considered to stand in a like relation to the land, large powers of dealing with it by way of sale, exchange, lease, and otherwise, and by jealously guarding those powers from attempts to defeat them or to hamper their exercise. At the same time the rights of persons claiming under the settlement are carefully preserved in the case of a sale, by shifting the settlement from the land to the purchase money, which has to be paid into Court or into the hands of trustees" (at the option of the tenant for life).

The money so paid can be applied in a variety of ways for the extension of the property or the release of incumbrances; or can be invested upon certain specified securities, according to the direction of the tenant for life, or may be applied in the execution of permanent improvements, a long list of which is inserted in the Act. The Act also contains elaborate clauses providing for the working out of the general idea, and, speaking broadly, may be said to give a tenant for life or other limited owner, powers of management as large and varied as those of an absolute owner, but making provision for safeguarding capital money arising from the settled land, so that it cannot be either pocketed or wasted by the tenant for life.

The following salient points should be noted:

(1) The tenant for life in possession — the head of the family for the time being — the man most interested in the prosperity of the property, is the person in whom the statutory powers of selling, leasing, and improving are inalienably vested. The powers are not confided to independent trustees, who would naturally take a languid and platonic view of the situation. It is this provision which is the life-blood of the Act.

(2) The life tenant cannot part with his statutory powers, even although he parts with his life estate; but in that case, if he exercises the powers, they are without prejudice to the estate *per autre vie* of his assignee.

(3) Except in the case of the mansion house, or its demesne lands, or of heirlooms, the tenant for life is not fettered by the necessity of obtaining the consent either of the Court or of the trustees. True, he has to give notice to the trustees of his intention to exercise his statutory power; but that is merely to enable them to keep an eye upon him, so that, if he should attempt to use his powers fraudulently, they may apply to the Court to stop him.

(4) As to improvements, the Act provides (sec. 29) that every limited owner may, without impeachment of waste, execute any improvement specified in section 25, or inspect, repair, or maintain it, and for these purposes may do all acts proper for the execution, maintenance, repair, and use thereof, and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

(5) With regard to leases, the tenant for life is empowered to grant building leases for 99 years, mining leases for 60 years, and other leases for 21 years, subject to certain formalities, and at the best procurable rent. Moreover, where it is shown to the Court that it is the custom of the district to lease for building or mining purposes for a longer term or on other conditions than those specified, or even in perpetuity, and that it is difficult to get a tenant except on the local terms, the Court may authorise leases in conformity with such custom.

(6) In connection with sales or building leases, the tenant for life may cause any part of the land to be appropriated for streets, squares, gardens, and open spaces.

(7) In the case of mining leases, as the property necessarily depreciates as the minerals are abstracted, the Act provides that where a mining lease is made, whether of opened or unopened mines, there shall be set aside as capital money under the Act, three-quarters of the rent if the tenant is impeachable for waste, and one-quarter if he is not.

Lastly, any prohibition of the powers of the Act contained in any settlement is to be absolutely void.

Such is a rough sketch of this great Act, an Act which has been, in my opinion, a complete success.

There have been several Acts amending the Act of 1882, but they have only dealt with detail, and in nowise affect the broad principles on which the main Act was founded.

In addition to this great statute, the past century has seen a considerable number of minor changes in the law of settled land. For instance, take the case of contingent remainders, words of fear almost as unwelcome to the ear of the student as the note of the cuckoo is said by Shakespeare to be to that of the husband.

In the year 1801, if real estate was settled upon A for life, and after his death to such of his children as should attain 21, then, if A's life estate came to an end before any of his children attained 21 years of age, the gift to the children failed. The rule was that a contingent remainder must become vested at or before the determination of the preceding estate of freehold, otherwise it was void. It was immaterial how the preceding estate of freehold came to an end, whether by forfeiture, surrender, merger, or by the death of the life tenant. To prevent this, it was usual to go through the form of appointing trustees to preserve contingent remainders (a pure technicality — as pure a technicality as fines and recoveries). On the other hand, where a contingent interest in land was limited by way of executory devise, it did not fail by reason of the preceding estate coming to an end before the contingency became a certainty. This absurd distinction, depending entirely on logical deductions from feudal notions, has gradually been abolished. In 1845, by the 8th section of the Real Property Act of that year,[1] it was enacted that henceforth no contingent remainder should fail by reason of the determination of the preceding estate by forfeiture, surrender, or merger. The author of this Act, however, curiously enough, still left a contingent remainder liable to be defeated by the death of the preceding life tenant before the contingency had become a certainty, and the law so continued until 1877. In that year, in consequence of the very hard case of *Cunliffe* v.

[1] 8 and 9 Vict. c. 106.

Brancker [1] (where a whole family of children were deprived of property, because an unskilful draftsman had not given trustees of a will a sufficient legal estate to preserve the contingent remainder), an Act was passed, called the Contingent Remainders Act.[2] By this Act the liability of contingent remainders to destruction by the natural expiration of the preceding estate has been practically abolished with regard to remainders arising under instruments executed since the 2nd August, 1877. No one, I think, can doubt the wisdom and justice of this.

Another point on which the law of settled land has been changed in the direction of freedom is with regard to accumulations. In the beginning of the year 1800 the rule against perpetuities (afterwards authoritatively declared in *Cadell* v. *Palmer*[3]) was doubtless in force, but it nevertheless permitted the income of real or personal estate to be accumulated during the whole of the period of lives in being and 21 years afterwards. A certain eccentric Mr. Thelluson, taking advantage of this, successfully directed that the income of all his real estate should be accumulated during the life of the survivor of his descendants living at his death, for the benefit of his remote descendants. This created such an impression that an Act was passed in July 1800, commonly called the Thelluson Act,[4] thereby conferring an immortality on the testator which he did not merit. By this Act, accumulations are prohibited for longer than four alternative periods, viz., the life of the settlor, or 21 years from his death, or during the minority of any person living at his death, or during the minority of any person who, if of full age, would be entitled to the income. These restrictions have been tightened by the Accumulations Act, 1892, which prohibits accumulations *for the purpose of purchasing land* for a longer period than the minority of the person who, if of full age, would be entitled to receive the income directed to be accumulated.

So much with regard to the changes in the law of settled

[1] 3 Ch. D. 393.
[2] 40 and 41 Vict. c. 33.
[3] *Tudor's Leading Cases in Conveyancing*, 578.
[4] 39 and 40 Geo. III. c. 98.

land. Much still remains to be done to place our law of settled property on a rational basis. For instance, learned members of the legislature might well turn their attention to the law relating to repairs of settled land, which is in a most confused and absurd state. The law, according to a decision of the late Mr. Justice (afterwards Lord Justice) Kay, in *re* Cartwright,[1] is that a legal life tenant is not liable to keep in repair freehold lands or houses. The same rule also apparently applies to an equitable life tenant.[2] Nor has the Court any jurisdiction, where the estates are legal estates, to order money to be raised on the security of the corpus for making repairs,[3] although there appears to be such jurisdiction where the property is vested in trustees. Surely this is a very irrational and thoroughly impolitic state of the law. Either the life tenant ought to be made to keep property in repair, or the Court ought to have jurisdiction in every case to sanction a charge for the purpose on the inheritance. Something ought to be done to clear away an *impasse* which is a disgrace to our law.

I know of an estate where the present life tenant, an old man, is allowing all the farm-houses, cottages, and buildings to go into absolute ruin, roofs have fallen in, fences and gates are broken, and the whole estate given over to decay, yet the remainderman has no remedy.

(2) *Changes in the law relating to the real estate of persons under disability*

I now come to another branch of our subject, viz. changes in relation to disability, including the power of dealing with property on behalf of persons under disability.

In the year 1801 a married woman entitled to land for a legal estate in fee simple could not sell, mortgage, or deal with it in any way, either with or without the joinder of her husband, except by going to the outrageous expense of suffering a fine — a collusive action, which, like a common recovery, necessitated the carriage of the business

[1] 41 Ch. D. 532.
[2] *Re Courtier*, 34 Ch. D. 136.
[3] *Re de Teissier*, (1893) 1 Ch. 153.

through a multitude of Government offices, in each of which, I need scarcely say, fees were extracted. She could not make a will of her fee simple lands. She could not even release her contingent right to dower on a sale by her husband of his own lands, without suffering a fine. It was at that date also considered to be very doubtful whether she could deal with the fee simple where it was settled to her separate use, the prevailing view being that the separate use was confined to her life interest and could not affect her heir.

By the Fines and Recoveries Abolition Act, 1833,[1] however, her position was to some extent improved, and she was enabled to dispose of her fee simple lands by a deed with the approbation of her husband, and acknowledged by her to be her free act before Commissioners. That, of course, only cheapened matters.

In 1865 it was decided, in the case of *Taylor* v. *Meads*,[2] that a married woman could without these formalities dispose by deed or will of fee simple lands settled *to her separate use;* but it was not until 1870 that any fresh legislation came to the relief of married women. In that year the first Married Women's Property Act[3] was passed; but, so far as real estate is concerned, it only made statutory separate property of the *rents and profits* of real estates descending to a married woman as heiress. In 1882, however, Parliament passed a thoroughly revolutionary Married Women's Property Act,[4] which, like many statutes of importance, did not attract one quarter the interest evoked by a burials bill or a verminous persons bill or other measure interfering but little with the people's everyday life. The general effect of this bill has been (so far as women married after the Act came into force are concerned) to put them in the same position as men, and even to put women married before the Act into the same position so far as regards property their title to which first accrued after the Act. Thus married women, from a position of complete

[1] 3 and 4 Will. IV. c. 74.
[2] 34 L. J. Ch. 203.
[3] 33 and 34 Vict. c. 93.
[4] 45 and 46 Vict. c. 75.

proprietory subjection at the commencement of the century, have attained complete proprietory equality with men at the end of it. Nay, their position is even better than that of men; for if they are, by will or settlement, expressly restrained from alienation, they can snap their fingers at their creditors; and while their husbands are denied all participation in their worldly possessions, they (the husbands) still remain liable to third parties for their spouses' torts. But the privileges of the fair sex do not stop here, for while they can use restraint against alienation as a shield against their unfortunate creditors, the 39th section of the Conveyancing and Law of Property Act, 1881, enables a sympathetic judge to relieve them of it if it should prove irksome and contrary to their true interests. As has been happily written by a legal poet, Mr. Cyprian Williams:

"Surely e'en the host angelic can afford no happier station
Than the wife who has an income with restraint on alienation."[1]

So far married women. Let us now turn to infants, legal infants, *i. e.* persons under the age of twenty-one years.

In 1801 it was impossible to sell an infant's real estate (with a qualified exception in the case of gavel-kind lands) however desirable a sale might be. Even the Court had no inherent jurisdiction to order a sale, nor to authorise a settlement by an infant of his or her property on marriage. Nor was it possible to grant leases binding on the infant. It was impossible to spend money on the estate or to develop it in any way. If strict settlement was sometimes disastrous to a locality, still more so was a long minority. How different is the case now. By 1 William IV. c. 65 the guardian was empowered by the direction of the Court of Chancery to make ordinary mining or building leases of the infant's land for any term. By the Infants' Settlement Act, 1855,[2] a male infant of 20 and a female of 17 were enabled to make a binding settlement on marriage with the sanction of the Court. The Partition Acts, 1868 and 1876,[3] enabled the

[1] *Lyrics of Lincoln's Inn.*
[2] 18 and 19 Vict. c. 43.
[3] 31 and 32 Vict. c. 40 and 39 and 40 Vict. c. 17.

Court in a partition action where an infant is interested to order a sale and to vest the property in the purchaser.

The Settled Estates Act, 1877,[1] empowered the Court to order a sale, where an infant was interested in *settled land*. This did not affect infants entitled in *fee simple* in possession, but by the 41st section of the Conveyancing and Law of Property Act, 1881,[2] it was extended to fee simple estates.

By the 42nd section of the last-mentioned Act provision is made for the exercise by trustees appointed on behalf of an infant of very wide powers of management, including the carrying out of repairs, the working of mines, and so on.

Finally, by the 59th and 60th section of the Settled Land Act, 1882, the Court is empowered to appoint persons to exercise on behalf of an infant (whether tenant for life, in tail, or in fee) all the powers of sale, partition, exchange, and leasing given by that Act to tenants for life.

The old lawyers generally classified infants, lunatics, and married women together in a rising scale of intelligence. It remains to consider the positions of lunatics.

The Statute de Prærogativa Regis,[3] provided that the King should have the custody of the lands of idiots, subject to his supplying the idiot with necessaries, and returning his lands to his heir at death. It took, however, a fine distinction between idiots and lunatics, providing that with regard to the latter, the King should see that their households were competently maintained out of the rents and profits, any surplus being kept for their use on recovery, or, if they died, distributed for the good of their souls by the advice of the ordinary.

The lunatic, therefore, was in a better position than the idiot, inasmuch as the King appropriated the income of the one, but merely held it as trustee for the other. Moreover, the soul of the lunatic was provided for, while the idiot passed away "unhousel'd, disappointed, unanel'd." This distinction has for centuries been abolished, but it was not

[1] 40 and 41 Vict. c. 18.
[2] 44 and 45 Vict. c. 41.
[3] 17 Ed. II. cc. 9 and 10.

until 1853 that powers of sale, leasing, and so on were conferred on the Lord Chancellor in respect of the estates of persons *non compos mentis*. The subject is now governed by the Lunacy Act, 1890,[1] which confers on the Masters in Lunacy powers to sell, mortgage, improve, and lease the lunatic's real estate.

(3) *Changes in the law relating to the effect of death on real estate*

Let us now turn to the changes in the law relating to the effect of the death of an owner in fee simple. And first as to changes in the law of devolution.

In 1801, if a man died solely seised of real estate in fee simple, his widow was entitled to one-third of it during her life, and of this he could not deprive her either by will or deed, not even by a sale or mortgage of the land. The only method of doing it was by levying a fine with all its delay and cost. This "rusty curb of old Father Antic, the law," was destroyed by the Dower Act, 1833,[2] and now a widow can only claim dower on lands belonging to her husband at his death, and only then with regard to lands which he has not disposed of by his will.

In 1890, however, Parliament gave to certain widows, viz., the widows of persons who die intestate and without issue, a further first charge for £500 payable rateably out of the real and personal estate of the deceased. This Act, called "The Intestates Estates Act, 1890,"[3] was the result of several shocking cases where a man having made no will, all his real estate and half his personalty had passed to remote cousins, leaving the widow penniless, or nearly so.

With regard to heirship, at the beginning of the 19th century the matter was governed by a series of rules depending on custom and digested by Lord Hale. Ascendants in the direct line were never admitted. For instance, if a man died intestate, leaving a father and an uncle, the uncle took to the exclusion of the father, on the childish ground that

[1] 53 Vict. c. 5.
[2] 3 and 4 Will. IV. c. 105.
[3] 53 and 54 Vict. c. 29.

the law presumed that a man got his estate from his ancestors, and that consequently his father must have enjoyed it already. Moreover, half blood was not recognised as giving any right of heirship, and descent was traced from the last person seised. By the Inheritance Act, 1833,[1] the matter was codified, descent was thenceforward traced from the last purchaser instead of the last person seised, lineal ancestry were admitted as heirs (although the mother was placed very low down in the list) and the half blood were admitted on fair terms. Finally by the Land Transfer Act, 1897, freehold land now devolves in the first instance on the personal representative in the same manner as leasehold property; but, subject to debts funeral and testamentary expenses, he holds it in trust for the heir or devisee.

But in addition to succession, the effect of death on the liability of real estate to answer the debts of the deceased has been very considerably altered during the past century.

In 1801 the only property of a deceased person recognised as liable for simple contract debts, was the general personal estate. Unless he *charged* his debts on his real estate, the heir or devisee took it free from all debts except mortgage debts, crown debts, judgments and recognizances and debts arising under deeds *in which the heir was expressly mentioned*, and not even for such debts if the debtor devised the property to another.

Even in the case of mortgage debts, the heir or devisee, with gross unfairness, was entitled to be indemnified out of the general personal estate of the deceased.

This was a scandalous state of the law according to modern notions, and by various statutes, especially by 3 and 4 Will. IV. c. 104, and 32 and 33 Vict. c. 46, real estate has been made available for payment of debts of all kinds, and debts arising under deeds have not even priority over simple contract ones. Moreover, by the Acts known as Locke King's Acts,[2] where an heir or devisee takes real estate burdened with a mortgage debt or lien, he is to take it *cum*

[1] 3 and 4 Will. IV. c. 106.
[2] 17 and 18 Vict. c. 113, 30 and 31 Vict. c. 69, and 40 and 41 Vict. c. 34.

onere, and is to be no longer entitled to saddle the burden on the personal estate of the deceased — a very excellent extension of the maxim *qui sensit commodum debet sentire et onus*.

It sometimes happened, however, before these beneficial changes were introduced, that an honest testator charged his real estate with debts by his will, but omitted to give any directions as to how the charge was to be enforced. The executor could not enforce it, for the lands did not vest in him. Even if the real estate was given to trustees they could not sell or mortgage it to raise the charge, unless express directions were given to them to do so; and consequently a Chancery suit was in such cases inevitable. In 1859, however, Parliament passed the Law of Property Amendment Act of that year, which empowered a "devisee in trust" of real estate charged with debts, to raise the sum required by sale or mortgage; and if there were no devisees in trust, then a like power was given to the executors.[1] However, this Act only applied where the will contained a charge of debts, and in other cases a Chancery suit was necessary in order to get real estate sold for payment of them. But now, by the Land Transfer Act, 1897, freehold land always devolves on the personal representative, and he is given full power to sell or mortgage it for payment of debts whether expressly charged or not.

While on this subject, I may mention that there was no death duty levied on real estate until 1854, when succession duty was imposed; and now by the Finance Act, 1894, estate duty is added.

(4) *Changes in the Law relating to Limitation and Prescription*

So much for changes in the law relating to the acquisition of property by succession. Let us now turn to acquisition by what Continental jurists would call prescription. I say Continental jurists, because English lawyers usually restrict the term prescription to the acquisition, by long user,

[1] 22 and 23 Vict. c. 35.

of easements and profits *a prendre in alieno solo;* whereas on the Continent, it includes, with better logic, the acquisition of corporeal property by long user under what we call the statutes of limitation.

What was the state of the law as to acquisition by long user at the commencement of the 19th century?

With regard to corporeal hereditaments, the question was practically governed by [1] the Statute 32 Hy. VIII. c. 2, by which an undisturbed possession as of right for at least 60 years, was required to bar real actions and writs of right.

This state of the law lasted down to 1833, when the celebrated Statute of Limitations of that year was passed.[2] The general result of that Act was as follows:

(1) The period was reduced from 60 to 20 years.

(2) Where a rightful owner *sui juris* is out of possession, without acknowledgment of his title signed by the party in possession, for 20 years, the Act not only takes away the legal *remedies* for recovery of possession, but also abolishes his *right* to the property; so that even if he should recover possession without the aid of the Courts, he would be a trespasser.

(3) The Act made exceptions in favour of persons under disability, and persons beyond the seas, who were to have ten years from the cessor of their disability or return to England in which to assert their rights.

(4) It also provided that the statutory period should not begin to run against persons entitled to future estates or interests until those estates or interests became actually enjoyable in possession.

That was the broad general result of the Act of 1833. In 1874 a new Limitation Act was passed,[3] the effect of which was to substitute 12 for 20 years and 6 for the extra 10 allowed to persons under disability, and to take away altogether the exception in favour of persons beyond the seas. Truly a world which was vast in 1833 when ocean

[1] No doubt the Limitation Act, 1623, limited the right to bring an action of ejectment to 20 years, but it did not prevent real actions or writs of right being brought within 60.

[2] 3 and 4 Will. IV. c. 27.

[3] 37 and 38 Vict. c. 57.

steam navigation and telegraphs were unknown, has become so contracted by those great inventions as to make absence beyond the seas little more of a true disability than absence in the Hebrides was in 1833. The rights of future owners are also abridged by the Act of 1874, so that now a reversioner is only allowed 12 years from the time when the previous owner was dispossessed, or six years from the time when he himself became entitled in possession, whichever period may be the longest. Moreover, if the right of one reversioner is once barred, the bar is now made to extend to all subsequent reversioners.

Now, let us turn to the similar but more complex questions in relation to easements and *profits à prendre*. By the ancient Common Law, an easement or profit, could not be gained by long user. Then, probably in the reign of the third Edward, the Courts, on the analogy of the first Limitation Act,[1] laid it down that easements and profits might be gained by mere user traced back as far as 1189 (the first year of the reign of Richard I.). Then (as time progressed and it became impossible to trace back to that date) it was held that user during the memory of living witnesses was sufficient to raise a *prima facie* case, rebuttable by proof that the user first arose since 1189; by showing, for instance, that both the dominant and servient tenement were owned by the same person at sometime during that period. To meet this, the fiction of a modern lost grant was invented by the Courts, and juries were directed by judges to presumè a lost grant where 20 years user was shown. But this fiction still left it open to the owner of the land to rebut the right claimed, by showing that it could not have arisen by grant at all. Thus matters stood at the commencement of the past century.

This fiction, which imposed on juries the finding of a lost grant in which they probably had not the least belief, so shocked Lord Tenterden, that he prepared and piloted through Parliament the Statute known as the Prescription Act, 1833.[2] It must, I think, be called an ill-conceived Act,

[1] 3 Ed. I. c. 39.
[2] 3 and 4 Will. IV. c. 71.

because it leaves it uncertain, even at the present day, whether it relates to all easements, or only to those specifically mentioned; and moreover, it makes time in some cases operate against the owners of future estates (as in the case of easements of light), and not in other cases. It specifies 20 years as the period in some cases, and 30 in others. It did not touch rights in gross, nor *profits à prendre* except common rights, and it is very doubtful whether it touched easements of support at all. In short, this Act and the statutes of limitation might well be reconsidered in the light of modern decisions, and a new code, dealing with both subjects on one basis, will, let us hope, be one of the great statutes of the new century. It is absurd that while 12 years' possession should give a right to land, at least 20 should be required to give a right of way over land, that 30 should be required to give a right of common, and that even the testimony of living witnesses should only confer a *prima facie* right to a fishery or any other profit *in alieno solo*.

Since the Judicature Act, the theory of a lost grant has been considerably extended in cases of profits not falling within the Prescription Act. The old theory that a lost grant could be rebutted by showing that the right claimed was incapable of being granted at Common Law, has been modified to this extent, that if long enjoyment is shown, the Court will endeavour to presume a lost *lawful origin, legal or equitable*, even although the right claimed could not have been *granted* at Common Law. Thus in *Goodman* v. *Corporation of Saltash*,[1] an equitable right in the inhabitants of Saltash as beneficiaries under a lost charitable trust to fish in the river Tamar was presumed from long user, although no Common Law grant of such a right could be made to a fluctuating body like the inhabitants. The great case of *Dalton* v. *Angus*,[2] too, has decided, but on what principle is doubtful, that even if the Prescription Act and the theory of lost grant are inapplicable to rights of support, yet a right to support to buildings is acquired some-

[1] 7 App. Cas. 633.
[2] 6 App. Cas. 740.

how by twenty years' uninterrupted enjoyment. You see, therefore, that whereas in the year 1801 an easement or profit could only be gained by express grant, implied grant, or ancient prescription extending beyond the time of living memory (the implied grant or prescription being rebuttable), such rights may now also be gained as to some under the Prescription Act, and as to others under the new doctrine that a lawful (as distinguished from a legal) origin will be presumed from long user.

(5) *Copyholds and Commons*

I must remind you that copyholds are lands forming part of a manor, which have, in theory at all events, been holden from the lord from a period anterior to the statute *Quia Emptores* (1290), and were for many centuries held by the serfs and villeins of that lord as tenants at will. Gradually the Royal Courts came to recognise a custom, in all manors, of fixity of tenure, subject to the performance of services, and the payment of fines, fees, and heriots. So that, although copyholds are still formally described in all documents relating to them as held at the will of the lord, yet, since the time of Littleton,[1] Copyhold tenure has become little more than a very inconvenient form of ordinary tenure — an anachronism and a nuisance, and probably the greatest of all the obstacles to a simplification of the Land Laws. It has long ceased to be held by serfs and villeins, if for no other reason, because serfs and villeins themselves have for centuries ceased to exist. Indeed, it is not unusual nowadays to find that the copyholder is a person of far more social importance than the lord. I myself have known a case where the copyholder was a peer of the realm and the lord of the manor was the local ironmonger.

In the year 1800 copyhold tenure could, as now, be extinguished by merger, viz. (1) by the lord acquiring the tenant's interest, or (2) by the tenant acquiring the lord's. The latter is called "enfranchisement." A tenant could

[1] *Temp.* Ed. IV.

only obtain enfranchisement by the voluntary act of the lord, and where the lord was himself (as was most frequent) a tenant for life of the lordship, he was incapable of enfranchising, except under some express power.

At the commencement of the late Queen's reign an agitation had sprung up for the compulsory enfranchisement of copyholds, on the ground that the tenure had long since lost its *raison d'être;* and, by a series of Acts known as the Copyhold Acts (beginning in 1841 and now consolidated in the Copyhold Act, 1894),[1] either lord or tenant can, at the present day, insist on the enfranchisement of copyhold lands, the lord's compensation in case of dispute being settled by the Board of Agriculture. The lord's right of escheat, and his right to minerals and sporting rights, and the tenant's right of common, are, however, preserved.

And this brings me to the consideration of the changes in the law relating to Commons.

Whatever the real origin of common lands may have been, it has been settled for centuries that they are the freehold waste lands of the lord of a manor, over which, by ancient custom, prescription, or grant, certain persons called Commoners, have a right in common with the lord himself and others, to a *profit à prendre.* This profit is of divers kind. Sometimes it is a right to depasture cattle, sometimes to fish, sometimes to cut turf, and so on. At the beginning of the past century the law recognised no one as having any rights in common lands except the lord and the commoners. If they were all of one mind they could enclose the common and divide it among themselves. Moreover, by the Statute of Merton,[2] passed in 1265, the lord alone could, without anyone's consent, enclose part of a common, so long as he left sufficient to satisfy the rights of the commoners. Toward the end of the 18th century an idea sprung up that the total enclosure of commons was desirable in the public interest, on the ground that, thereby, additional land would be brought under cultivation; but, as the unanimous agreement of lord and commoners was not often obtainable, ow-

[1] 57 and 58 Vict. c. 46.
[2] 20 Hen. III. c. 4.

ing to some of the latter being under disability, private Acts of Parliament were usually necessary, and these of course were costly. For this reason Parliament passed a general Enclosure Act in 1845 [1] to "facilitate the enclosure and improvement of commons and lands held in common," and for other purposes. But this Act and its nine amending Acts only cheapened and facilitated the total enclosure of a common, by providing a cheaper procedure.

By the year 1866 a reaction had set in. The growth of cities and the increase of population had rendered the commons valuable as recreation grounds, while Free Trade had reduced their importance for agricultural purposes. Accordingly in 1866 and 1869, the Metropolitan Commons Acts [2] were passed to prevent the enclosure of commons in the neighbourhood of London, and to provide for their management and regulation. In 1876 another Commons Act was passed,[3] which, among other things, authorised the Enclosure Commissioners (now merged in the Board of Agriculture) to entertain proposals for the regulation of commons. By Section 8 no enclosure of suburban commons was to be sanctioned, unless the sanitary authorities of towns within six miles were represented before the Commissioners, and special provision was made for the benefit of the inhabitants of such towns. All these Acts related exclusively to *complete* enclosure, and left untouched the lord's right under the Statute of Merton to enclose so much of a common as was not required for the exercise by the commoners of their rights. In the year 1888 however that doctrine received a rude blow in the case of *Robertson* v. *Hartopp*.[4] In that case the Court of Appeal held that the question whether there was a sufficiency of common left, must be determined, not according to the average number of animals which the commoners had for a long period been in the habit of turning out, but according to the aggregate number which they were theoretically entitled to turn out. Moreover the Court queried whether the modern system of sheep farming, ac-

[1] 8 and 9 Vict. c. 118.
[2] 29 and 30 Vict. c. 122, and 32 and 33 Vict. c. 107.
[3] 39 and 40 Vict. c. 56.
[4] 43 Ch. D. 484.

cording to which sheep do not, while turned out, get all their sustenance from the common, ought to be taken into consideration. As one of the Counsel engaged, wittily observed, the question of sufficiency of common now depends on the problematical hunger of a hypothetical sheep. This case has since been followed by the Commons Act, 1893,[1] by which the lord's right to make a partial enclosure under the Statute of Merton is no longer to be exercised without the consent of the Board of Agriculture, which is to have regard to the same considerations, and if necessary to make the same enquiries as are by the Commons Act, 1876, to be made on an application for the total enclosure of a common. Since this Act has been passed, having regard to the trend of public opinion, it is safe to say that very few enclosures either total or partial have been or will be lawfully made.

(6) *Changes in the Law relating to Tithes*

Let us now turn to changes in the law relating to tithes. Tithes consisted of the right to a tenth part of the profits of land. At the beginning of the 19th century they were payable in kind, a most inconvenient practice. By the Tithe Commutation Act, 1836,[2] however, a rent charge was substituted, varying with the price of corn.

Between 1880 and 1891 an agitation against payment of this rent charge sprung up among Nonconformist farmers, especially in Wales, and reached such serious proportions (tenants refusing to pay, and submitting rather to have their goods distrained), that Parliament passed the Tithe Act, 1891.[3] By this Act tithe rent charge was in future made payable by the owner of land, and any contract between him and his tenant, under which the latter is to pay it, is made void. By this ingenious method the grievance of Nonconformist tenants was "scotched," without the parsons being deprived of the fund originally provided for their maintenance.

[1] 56 and 57 Vict. c. 57.
[2] 6 and 7 Will. IV. c. 71, amended by a long series of Acts.
[3] 54 Vict. c. 8.

(7) *Landlord and Tenant*

The past century witnessed numerous changes in the law relating to landlord and tenant — so many that it is quite impossible to touch upon all of them. The most important relate to distress for nonpayment of rent, relief against eviction or forfeiture for breach of covenants or conditions, and compensation for improvements made by the tenant of agricultural land.

The chief change that has taken place in the law of distress is with reference to lodgers' goods. Before the year 1871 the landlord of a person who let lodgings could enforce his rent, not merely by distraining the goods of his own tenant (the lodging-house keeper), but also the goods of that tenant's lodgers. This was, with reason, considered to be very unfair to lodgers; and, consequently, it was enacted by the Lodgers' Goods Protection Act, 1871,[1] that in the event of a lodger's goods being distrained by his landlord's landlord, the lodger might, under certain conditions and with certain formalities, require the superior landlord to give them up, under penalty of being adjudged guilty of an illegal distress.

With regard to relief against forfeiture (or eviction as it is more popularly called), the right to evict for nonpayment of rent or breach of covenant is not given to landlords by law. It depends entirely upon contract. For centuries, Courts of Equity have relieved against a condition for eviction on nonpayment of rent, on the terms of the tenant paying the rent in arrear, with interest; and statutory force was given to this doctrine so long ago as the 18th century. But the jurisdiction of Courts of Equity to relieve against forfeiture for breach of covenant was much more restricted, and was practically confined to cases where the breach had occurred through fraud, accident, or mistake. The consequence was, that a man who had let property on a long building lease at a ground rent, could annex the whole of the lessee's expenditure on the buildings, if the latter happened to commit some comparatively small breach of cove-

[1] 34 and 35 Vict. c. 79.

nant — for instance, a covenant to keep the buildings in repair or insured. In such cases the penalty was out of all proportion to the fault.

In the year 1859, Courts of Equity were empowered by Lord St. Leonard's Act,[1] to grant relief against forfeiture for breach of a covenant *to insure*, and that provision was subsequently extended to Courts of Common Law.[2]

In 1876, and again in 1877 and 1880, Sir Alfred Marten (the chairman of our Board of Studies) carried Bills through the House of Commons for extending equitable relief to lessees who might incur forfeiture for breach of covenant, but for one reason or another these Bills did not become law.

The entire subject is, however, now governed by section 14 of the Conveyancing and Law of Property Act, 1881,[3] which provides, that a right of forfeiture for breach of covenant or condition in a lease with certain specific exceptions,[4] shall not be enforceable by action, or otherwise, unless, the lessor serves on the lessee a notice, specifying the breach, and requiring the lessee to remedy it, and the lessee makes default in doing so for a reasonable time.

The Court is given power to relieve, on equitable terms as to damages, the granting of an injunction to restrain further breaches, and so on.

Agricultural tenancies have received the particular attention of Parliament during the last quarter of the century — first by the Agricultural Holdings Act, 1875, and subsequently by the similar Act of 1883, which repealed the former. The provisions of this Act (since amended by the Agricultural Holding Act, 1900) are too complicated for me to give them in detail. All I can do is to state shortly the general scheme of the Act with regard to improvements. The general scheme is to make landlords liable to pay to their outgoing tenants compensation for unexhausted im-

[1] 22 and 23 Vict. c. 35, secs. 4-9.
[2] 23 and 24 Vict. c. 126, sec. 2.
[3] 44 and 45 Vict. c. 41.
[4] Covenants against assigning or underletting, and covenants in mining leases and conditions for forfeiture on bankruptcy of the tenant. But as to the last see Conveyancing Act, 1892, sec. 3.

provements. The Act goes into great detail as to the nature of these improvements, as to the mode in which the compensation is to be assessed, and the mode in which its payment is to be enforced. But the persons who framed the Act had to deal with the fact that landlords in England are nearly always only limited owners, that is to say, that the greater part of farm land is in settlement, and the landlord is generally only a tenant for life. It would, therefore, be unjust to make a landlord pay for improvements out of his own pocket without giving him any right to recover the amount paid from the settled estate in the event of his immediate death. The plan adopted in the Act is to make a tenant for life pay the compensation to the outgoing tenant, but to give him a right to obtain a charge upon the settled estate for the amount of the payments so made by him.

The Act of 1883 differs from the previous Act of 1875 in the important particular that the Act of 1883 cannot be negatived by contract, whereas the Act of 1875 might be, and in practice always was.

The law with regard to agricultural fixtures has, also, been modified by statute. The first Act is 14 and 15 Vic. c. 25, sec. 3; but the subject is now governed by section 34 of the Agricultural Holdings Act, 1883, which provides that all agricultural fixtures put up by a tenant after the commencement of the Act may be removed at, or within, a reasonable time after the expiration of the tenancy; but one month's notice must be given to the landlord of the intention to remove, and the landlord has a right of pre-emption. Honour to whom honour is due. This reform of the law is again due to Sir Alfred Marten, who drafted and piloted through the Commons the clauses to the same effect in the Agricultural Holdings Act, 1875.

(8) *Fusion of Law and Equity*

I now come to what at one time seemed to be the most important change of the 19th century in the realm of law, viz., the Judicature Act, 1873. At first it was thought by many that this Act would so completely fuse law and equity

as to abolish the protective efficacy of the legal estate, and thereby do away with the necessity of legal conveyances.

It soon, however, became obvious that all the Act did was to fuse the Courts, and not the principles administered by them; that the old distinctions between the legal and equitable estate were still preserved; and that, in fact, persons who acquired the legal estate in property with all the formalities required by common law or statute, were still to be regarded as *primâ facie* the true owners, unless and until someone else could show that he had a better claim in equity. The purchaser who has been careful to embark in a legal estate, may still regard with a complacent mind a sea of contending equities which might otherwise engulf him. In fact, the main effect of the Judicature Act, so far as the fusion of law and equity is concerned, may be expressed in three lines from King Lear:

> "Thou robed man of justice, take thy place,
> And thou, his yoke fellow of Equity,
> Bench by his side."

And perhaps it is as well that this was so. In 1875 Parliament purported to take away partially the protective efficacy of the legal estate in the case of mortgages, leaving rival innocent incumbrancers to rank according to the respective dates of their securities. The result was, however, so disastrous to the credit of persons wishing to borrow on mortgage, and particularly to builders and others accustomed to borrow by instalments, that a precipitate retreat had to be made, and the old rule was restored in the next session.[1]

(9) *The Practice of Conveyancing.*

So far I have been dealing with the changes in the general law of real estate. I now propose to draw your attention to changes relating to instruments by which the ownership of real estate is transferred from one person to another. Such transfers occur either *mortis causa* — in plain English,

[1] See 37 and 38 Vict. c. 78, sec. 7, and 38 and 39 Vict. c. 87.

by wills — or *inter vivos* — *i. e.* by transfers made by living persons.

In the early part of the 19th century, a will of real estate had, under the provisions of the Statute of Frauds[1] to be witnessed by three credible witnesses. If one of them was considered to be "incredible" (for instance if he were a convict, or even if he took beneficially under the will,) the entire will was void. Moreover, every general devise of land spoke from the date of the will, and not from the death of the testator; so that no freehold land acquired after the date of the will passed by it, unless the will was confirmed by a subsequent codicil. A devise of real estate without words of limitation, only *prima facie* passed a life estate to the devisee — a shocking injustice in the frequent case of an unlearned testator making his own will.

Copyholds, too, could not be devised at all, except by special custom, unless they were surrendered to the lord to uses to be declared by the will, or unless they were vested in trustees; so that, unless the formality of a surrender, or the creation of a previous trust had been effected, the will was useless so far as Copyholds were concerned. This absurdity was removed in 1815, by the Act 55 Geo. III. c. 192, which rendered devises of copyholds, though not surrendered to the use of the testator's will, as valid as if they had been so surrendered. It conferred no new testamentary power, but merely supplied a simpler form of procedure.

However, the great reform of the century in relation to the law of wills, was made in 1837 by the Wills Act.[2] By this Act a will is to be signed in the presence of two witnesses, instead of three, and the credibility of the witnesses is not to affect the validity of the will; but where a witness, or his or her husband or wife, is beneficially interested under the will, the will is good, but the gift to the witness is void. Wills are to speak, with regard to the real and personal estate comprised in them, from the death of the testator, and not, as formerly, from the date of the will. A gift to a child or other issue of the testator, who dies before him, leaving

[1] 29 Car. II. c. 3.
[2] 1 Vict. c. 26.

issue, no longer lapses as formerly, but takes effect as if the donee had died immediately after the testator.

The Wills Act also put the subject of revocation of wills on a better footing, providing that, among other acts, marriage should be an effectual (although perhaps an expensive) revocation. The act also made a general devise of lands, to include not only lands belonging to the testator, but also lands over which he has a general power of appointment.

But perhaps the most important change introduced by the Wills Act was the provision that, where real estate is devised to a person without words of limitation, it is to be construed as passing the fee simple, or other the whole estate of the testator, unless a contrary intention shall appear, thereby completely reversing the former rule.

There were other changes introduced by the Wills Act, too numerous or too technical to mention here, but those which I have specified were the most important.

Let us now turn to transfers of real estate by act *inter vivos*. At the commencement of the 19th century, conveyances of land on sale were usually carried out by the method known as a lease and release. In some cases, however, the time-honoured feofment with livery of seisin continued to be used. As I said in the last lecture, married women could only convey by means of the costly process called a fine, and tenants in tail by the still more costly process of a Common Recovery, for both of which simple deeds were substituted in 1833.

You will remember that the lease and release was an ingenious method of making conveyances without livery of seisin, depending for its efficacy on the Statute of Uses. A vendor first made a bargain and sale of the property to the purchaser for a year in consideration of 5s. Under the Statute of Uses this immediately vested the legal possession in the purchaser. Being thus in legal possession, the reversion which still remained in the vendor, was capable of being released by another deed, in which the true consideration for the transaction appeared. This method required two instruments, and was cumbersome and expensive; and it is astonishing that it took several centuries before its absurdity

struck Parliament. It was not until 1841 that any attempt was made to put the matter on a more rational footing. In that year an Act was passed, by which it was provided, that a release, if expressed to be made in pursuance of that Act, should be as effectual as a lease and release. This was absurdly illogical, as a release was essentially an instrument releasing an outstanding right, in favour of one who already had a possessory interest. In 1845 the matter was put on a more satisfactory basis by the Real Property Act [1] of that year, by which it was enacted that all corporeal hereditaments should thenceforth "be deemed to lie in grant, as well as in livery." In other words, the old Common Law theory that actual delivery of possession, or the newer theory that a notional delivery by the aid of the Statute of Uses was necessary to a transfer of freehold land, was swept into the limbo of pedantic rubbish, and a simple deed of grant was made sufficient. This deed of grant is still the common form of conveyance.

Nevertheless, a deed of grant in 1901 is a very differently worded instrument to what it was in 1845. True, the framework is the same. The parties, recitals, and operative part still survive; but they are shorn of that extraordinary splendour of verbiage which distinguished documents, the draftsmen of which were paid at the rate of so much per 72 words.

This latter-day brevity is owing to the Conveyancing and Law of Property Act, 1881,[2] not unassisted perhaps by the Solicitors' Remuneration Act of the same year,[3] by which the remuneration of solicitors takes the form of a commission on the purchase money instead of fees varying with the length of the documents. By the first of these Acts all the old and lengthy covenants for title entered into by a vendor were swept away, and implied statutory covenants were substituted. Such covenants now depend upon the capacity in which the vendor is expressed to convey the property. If he purports to convey as beneficial owner, one

[1] 8 and 9 Vict. c. 106.
[2] 44 and 45 Vict. c. 41.
[3] 44 and 45 Vict. c. 44.

set of covenants are implied; if as trustee or mortgagee or personal representative, another set.

Moreover, instead of the lengthy covenant to produce deeds and keep them safe, a simple acknowledgment of the right to production, and an undertaking for safe custody, implies elaborate statutory duties in that behalf. In fact, to paraphrase the advertisement of a modern camera, if the practitioner has sufficient intelligence to put in the right catch-words the Act of Parliament does the rest.

I now approach the last branch of the subject, viz., the new system of land transfer, which was practically initiated in 1897. I say practically, because, theoretically it was first started in 1862. But it only became practical in 1897, because it was for the first time made compulsory in certain districts by the Land Transfer Act of that year.[1]

At present it is in an experimental stage, but although highly unpopular with the profession, I confess that it seems to me to be likely in course of time to supplant the present system. Its object is to cheapen and shorten the investigation which a purchaser or mortgagee of land has now to make by destroying the necessity for a continual repetition of investigations of title on sales or mortgages however closely they may follow each other.

Under the present system a purchaser under an open contract is entitled to have handed to him an abstract of every document affecting the title executed within the past 40 years. This abstract has to be compared with the original documents, the effect of each instrument has or ought to be considered by a lawyer, and deaths, pedigrees, and intestacies proved.

Now if this were done once for all, the expense on each subsequent sale or mortgage would be a trifle; but under the existing system, this expensive investigation has to be repeated *ab initio* every time that a sale or a mortgage is made.

It is this *repeated* investigation that registration of title is intended to avoid. The registrar keeps the histories of all titles on his books up to date, so that an intending pur-

[1] 60 and 61 Vict. c. 65.

chaser or mortgagee has only to ask what the state of the title is, and the registrar is able to tell him at once who is the owner and what incumbrances or restrictions, if any, affect the property.

I am informed that in the U. S. (at all events in New York) the same thing has been effected in a different way by means of insurance companies. There, by payment of a small premium, a landowner can get his title investigated and guaranteed by an assignable policy, and this policy is accepted by purchasers and mortgagees in lieu of any investigation of his title. Some of us may think that this simple expedient might have been tried here; but whether owing to want of enterprise on the part of insurance companies, or what, I know not, I believe it has never been publicly suggested.

The first attempt at registration of title in England was made in 1862 when the late Lord Westbury succeeded in passing an Act to facilitate the proof of title and conveyance of real estate.

This Act was not compulsory. Its fatal defect was that it only provided for the registration of indefeasible titles after strict examination. The result was that Lord Westbury's Act was practically a dead letter.

The next attempt was made by the late Lord Cairns in the Land Transfer Act, 1875, the broad principle of which was (1) that landowners could register with a mere possessory title, *i. e.* should not be bound to have their title investigated at all, and (2) that some person (not necessarily the fee simple owner) should be registered as proprietor, trusting to cautions and inhibitions lodged with the registrar, to prevent such registered proprietor (who is in reality a trustee for all persons interested) making away with, or incumbering the property, where he could not legitimately do so. This Act was not compulsory, and, mainly for that reason, was as complete a failure as Lord Westbury's Act of 1862, and remained practically a dead letter until the present Chancellor promoted and safely piloted through Parliament the Land Transfer Act of 1897. This Act is in form merely supplemental to the Act of 1875, but

it is in substance far more important, because, by containing provisions for gradually making the registration of titles compulsory throughout England[1] on the occasion of sale, it has supplied the spark of life to the inert mass of the 1875 Act. Very wisely its author did not attempt to frame elaborate details, but reserved powers to refer such details to a Committee of experts who have issued an elaborate code of rules.

Let us examine the details of the new scheme so far as time will permit.

Freehold land (for the Acts do not relate to copyholds, and there are separate provisions as to leaseholds) may be registered with either

(*a*) An absolute title,
(*b*) A qualified title, or
(*c*) A possessory title.

But it may be safely predicted that although section 17 of the Act of 1875 permits and encourages the registrar to give a certificate of absolute title to one who has merely a good holding title, and expressly reserves all questions of boundaries, but few proprietors will elect to register with anything but a possessory title. They did not do so before 1897, and there seems to be no new reason why they should go to the expense and risk under the Act of that year.

What, then, is the effect of registering land with a possessory title? The immediate effect is microscopic. In such cases, all that the registrar can say is — "On such and such a date, A registered this title as a possessory title. Whatever estate, if any, A then had, is now vested in B as his registered successor. But whether A was fee simple owner when he placed the title on the register, I cannot say, nor can I guarantee that the title is free from flaws before that date. You must therefore investigate the title of A up to the date when he first registered it, or else take the risk." In other words, registration with a possessory title, does not in any way affect or prejudice the enforcement of any estate, right, or interest adverse to the estate of the *first* registered proprietor. The registrar, on the other hand, will

[1] At present it is confined to the County of London.

be able to give a guarantee that whatever estate, if any, the first registered proprietor was entitled to, is now vested in the vendor as his successor. And of course, when property has been on the register for 40 or 50 years, so that all probabilities of the first registered proprietor having been a mere life tenant may be disregarded, then, practically, such a registered title will have become as good as an absolute one, and certainly as good as an ordinary marketable one.

The net result is, that until a possessory title has been registered for 40 years at least, it will not be safe to assume that it is a good one, or that a purchaser or mortgagee who fails to investigate the title prior to the first registration will get any relief or compensation if he should be turned out. And this danger is accentuated by the fact (regrettable, I think) that, by rule 18, a person who registers with a possessory title, is not bound to state whether the property is encumbered.

There are three registers to be kept, viz.:

(1) A Property Register,

(2) A Proprietorship Register, and

(3) A Charges Register.

The property register contains a description of the property and refers to a plan, the filing of which is compulsory. The property register also describes all easements and restrictive covenants existing for the benefit of the registered property.

The proprietorship register states whether the title is absolute, qualified, or possessory, specifies the registered proprietor, and contains a note of any cautions, inhibitions, and restrictions affecting his right of disposition.

The charges register shows not only mortgages and other incumbrances, if any, but also servitudes and restrictive covenants, with which the registered land is burdened. (Rules 3, 6, and 7.)

There is no investigation whatever of title on an application to register with a possessory title. Indeed it would swamp the scheme if there were. It has been estimated (and Lord Cairns satisfied himself in 1875, that the estimate was

not far wide of the mark) that upwards of 1000 conveyances or mortgages are executed on every working day of the year. If on the registration of these transactions an official investigation had to be made, it is obvious that some thousands of skilled registrars would be needed.

Having regard to the custom of strictly settling estates in this country, and also to the frequency of mortgages, it is clear that in any system of registration of title, these facts must be taken into consideration. Consequently we find that the Act provides not merely that a fee simple owner may be registered as "proprietor," but also:

(1) Trustees for sale,
(2) Mortgages whose power of sale has arisen, and
(3) Tenants for life.

But in whichever of these capacities a man is registered he becomes (*qua* the outside public) capable of selling and conveying or charging the fee simple. He is not registered as Trustee Proprietor, as Mortgagee Proprietor, or as tenant for life Proprietor, but simply and solely as proprietor.

You may ask, in that case, what safeguard is there for the beneficiaries, the mortgagor, or the remainderman, as the case may be. What is to prevent this fictitious statutory proprietor from selling the land, and pocketing the proceeds? The answer is, that where these limited owners are the first registered proprietors, then (as I have already mentioned), their proprietorship is by the Acts, made expressly subject to all estates rights and incumbrances existing at the date of that registration. Their position, *qua* purchasers, is no better and no worse than if he had never registered.

Where, however, a trustee, tenant for life, or mortgagee, is not the first registered proprietor, and the settlement or mortgage was not in existence at the date of the first registration, then, *prima facie*, the registered proprietor (although only in fact a limited owner) can sell, or convey, or charge the property, and confer a good title on his purchaser or mortgagee. I say *prima facie*, because the Acts and rules provide means by which the remainder-man (in

the case of registered tenant for life proprietors), the beneficiaries (in the case of trustees) and the mortgagor (in the case of mortgagees) may protect themselves against the abuse by a registered proprietor of his statutory powers, viz.: by the registration of cautions, inhibitions, or restrictions.

A caution merely entitles the person giving it to notice of any intended transfer or charge. It is the equivalent of a stop order on a fund in Court. It would appear to be the appropriate safeguard of *cestuis que trusts* and equitable mortgagees.

An inhibition, while it remains in force, is a complete bar to any registered transfer or charge. It can only be placed on the register with the consent of the registered proprietor or the order of the registrar or the Court.

A restriction is a notification placed on the register with the assent of the registered proprietor, restraining registered transfers or charges without certain consents, or unless purchase money is paid to certain persons. It is apprehended that restrictions and inhibitions will be the appropriate safeguard where trustees for sale, or tenants for life, are the registered proprietors. Take for example the case of a tenant for life; form 6 appended to the rules gives the formal restriction and inhibition in the following words:

"Restriction. — Until further order, no transfer of the land is to be made except on sale or exchange, and the purchase moneys on sale are to be paid to A. B. and C. D., or into Court. No sale of the mansion house and land shown and edged red on the plan attached hereto is to be made without the consent of the said A. B. and C. D., or of the Court, and no charge is to be created without the consent of A. B. and C. D.

Inhibition. — On the death of E. F. (the reg. pro.) no entry is to be made until further order."

In this form you see that the power of sale and exchange given to tenants for life by the Settled Land Acts is preserved, subject to the conditions annexed by these Acts to the exercise of the power, viz., that the purchase money is to be paid into Court or to two trustees. But, as these Acts

give no powers to mortgage except for very restricted purposes, the restriction prevents the tenant for life charging the property, as he would (as registered proprietor) be otherwise capable of doing. Then, again, as the Settled Land Acts prohibit the sale of the principal mansion house without the consent of trustees or Court, the registered restriction provides for that. And, lastly, the inhibition prevents any attempt by the personal representatives of the tenant for life getting themselves placed on the register.

Subject to the safeguards afforded by cautions, inhibitions, and restrictions, however, and to estates, incumbrances, and interests, existing at the date of the first registration of a possessory title, a registered proprietor has full power to confer on a purchaser or chargee, a good title free from the claims of persons whose interests have arisen since the date of the first registration; even (according to section 83 of the 1875 Act as amended by the Act of 1897), although such purchaser or mortgagee has notice of such interests. That provision at first sight seems monstrous, but its bark is worse than its bite, because, as I shall presently show you, any person who is injured, and who has not by carelessness contributed to his injury, will get compensation from the State.

Curiously enough, although a registered proprietor can thus deal with the land itself, so as to defeat the rights of persons who have not entered cautions or restrictions or obtained inhibitions, the Acts do not enable him to create easements or profits with a similarly clear title; so that he who purchases a right of way over land, would, it would seem, have to investigate the title of his vendor to create the right — surely a strange anomaly. Still stranger is the fact (at least it seems to me to be the fact) that although the Acts give a registered proprietor (against whom there are no cautions, inhibitions, or restrictions) full power to alienate the fee simple, they give him (at all events not in express terms) no corresponding power to create unimpeachable leases. A lessee, therefore, who is taking a long term with the view of spending money on property (*e. g.* under a building or mining lease) will apparently still have to

investigate the title of the registered proprietor to grant the lease.

A similar remark applies to all persons whose rights are not in possession. The registered proprietor must always be the man entitled to possession. The Act makes no provision for registering titles in reversion or remainder, or the equitable rights of beneficiaries. If, therefore, a reversioner, or remainder-man, or beneficiary, wishes to sell or mortgage his interest in registered land, the register will be useless to him, and his title will still have to be investigated in the old way.

I now turn to a different branch of the subject. What is to happen where, owing to fraud or mistake, the register does not represent the true state of the title, so that someone has blundered and someone is injured? The answer is, that the injured party will receive compensation from the State. It was one of the many weaknesses of the Act of 1875 that by making the register infallible in favour of purchasers or mortgagees who acted on the faith of it, it threatened the security of landowners whose estates were acquired after the first registration (even of those in possession) without giving them any compensation. A *bona fide* purchaser for value who got on the register, was apparently secure, even although he claimed under a forged transfer; and the unfortunate true owner, even when in possession, was liable to be ousted without a penny of compensation. This was one of the many reasons why lawyers dissuaded clients from registering their titles under the Act of 1875. The Act of 1897 has recognised the injustice of this, and absolutely safeguards the true owner *who is in possession*. Any fraudulent or erroneous entry in the register to which he is no party is not to affect *him*. On the other hand, any other person who is injured by it, will be compensated in money by the State, and the register will be rectified.

Possession is still therefore a strong fortress of the law, but it is not so strong as it has heretofore been; because the register, and not possession, is *prima facie* evidence of title. So that where the register has been fraudulently or errone-

ously tampered with, the onus of proof will be shifted to the man in possession.

However, even a true owner who is ousted, will not get compensation where "he has caused or substantially contributed to the loss by his act, neglect, or default"; and the omission to register a sufficient caution or inhibition or other restriction, to protect a mortgage by deposit or other equitable interest, is to be "deemed to be a neglect"[1] — a plain hint to beneficiaries to look sharply after their trustees.

In order to make the register, and the register only, the true test of title, sec. 12 of the Act of 1897 contains a very strong and debatable enactment in these words:

"A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly." In other words, the Statutes of Limitation are not to apply to registered land. It is true that the section goes on to provide that where a person not on the register, has been in possession for a period sufficient to give him a title under the Statute of Limitations, he may apply to the Court to rectify the register in his favour. But the necessity of commencing active litigation is very different to the acquisition of a title by passive possession; and moreover, the Court is only to rectify the register subject to any rights acquired for valuable consideration on the faith of the register. Here, then, is another assault on the fortress of possession. Registration and not possession will be the nine points of the law in future. Mr. Cherry, in his excellent book on the Acts, points out that the draftsman seems to have confused registration of title and possession. "All that a register can properly do is to show the state of the paper title, and a purchaser or a mortgagee ought to satisfy himself by enquiries on the spot as to whether he will get possession under that paper title. The point is not merely academic. Take the case where A purchases land from B, but owing to some mistake

[1] Act of 1897, sec. 7 sub-sec. 3.

or carelessness of his solicitor plot X is not described in the registered map. A goes into possession, and retains possession of plot X, say, for twenty years, and perhaps builds on it. Plot X all this time remains on the register in B's name, and on his (B's) death his executors sell and convey to C, who gets himself registered. Here it seems plain that A, the real owner, will lose plot X, and get no compensation, although if C had taken the simple precaution of asking on the premises, he would have learnt of the mistake."

So far as to registration. Now a few words as to transfer of registered land. A transfer, then, is to be made under rule 77 by an instrument in a prescribed form.

Here is the form:

"Land Transfer Acts, 1875 and 1897.

District . . . .
Parish . . . . .
No. of title . . . . .

25th March, 1900. In consideration of £ , I, A B, of, etc., hereby transfer to C D, of, etc., the land comprised in the title above referred to.

Signed, sealed, and delivered, etc."

The transfer being made, the registrar keeps it, and hands to the transferee a scrap of paper called a "land certificate," which henceforth is his sole evidence of title. The bulky and imposing sheepskin so familiar to us all, on which, in the pompous metaphor of legal writers, a landowner is entitled to sit, will gradually give place to this single attenuated document; so that, apparently, in the fulness of time, the English landowner will become a kind of territorial cherub.

With regard to transmission of registered land on the death of a registered proprietor, the appointment of a real representative by the Act of 1897 has greatly facilitated matters, because it has created a person with whom the registrar can deal.

Where, however, the land is settled, the question is not so

simple, and this, I fancy, is where the officials will find the shoe pinches. For instance, where the deceased is only tenant for life, the property does not vest on his death on his real representative, and the registrar has to look to someone else to deal with. Where possible, the trustees of the settlement (if any) are to undertake this duty.

There are, however, many cases where either there are no trustees of a settlement or they are supine. In such cases any person interested may apply for the registration of a new proprietor. In that case (and here the difficulty arises) the registrar must enquire into the terms of the settlement, settle draft restrictions and inhibitions, give notice to the trustees (if any), to the succeeding tenant for life, and such other persons as he may think fit, and, if no valid objection is made, enter the successor as proprietor.

So much for the registration of freehold titles.

The Acts and rules also make provision for the registration of leasehold titles much on the same lines. All I need say on this subject is, that in areas where registration is compulsory all new leases, (and also transfers on sale of all existing leases) having at least 40 years to run, must be registered.

We now come to the very important subject of mortgages of registered land, and, curiously enough, the Acts and rules make no provisions whatever for legal mortgages in the ordinary sense. If a regular legal mortgage is required the only way of creating it is to imitate the present mode of making a mortgage of stocks or shares, viz., to substitute the mortgagee as the registered proprietor, and then to regulate the equitable rights of the parties by a collateral deed, which is not entered or noticed on the register at all.

What the Act of 1875 does do, however, is to create a new kind of statutory mortgage, called a registered charge. This charge is really an equitable charge. It does not pass the legal estate to the chargee, but merely gives him a lien with certain implied covenants for payment of principal and interest, and statutory powers of sale, foreclosure, etc. (Secs. 22-28).

Now, if the land be registered with an absolute or quali-

fied title, these registered charges may be well enough, because they are to rank *inter se* in order of registration. But where land is registered (as most land will be) with a possessory title, then, as all registered dealings are to be subject to unregistered dealings entered into prior to the date of the first registration, a registered charge will be nothing more or less than an equitable mortgage, which, as we all know, is subject to all prior equitable mortgages and claims, whether known or unknown. That is not a very enticing prospect, and, therefore, I imagine that for many years to come registered charges will be neglected in favour of true legal mortgages, in which the mortgagee will insist upon being placed on the register as proprietor of the land, so as to get the protection of the legal estate, the mortgage itself being regulated by a collateral deed. But in addition to regular mortgages, we all know that there is, under the present system, an important class of equitable mortgages, known as mortgages by deposit of deeds. To the commercial community this is, perhaps, the most important, because it is the way in which a commercial man can instantly, without any delay whatever, raise money from his bankers. He deposits his pile of sheepskins, and the money is at once carried to his credit. How is this to be effected under the new system? The answer is, by deposit of his land certificate (sec. 8 sub-sec. 4 Act of 1897). In one way this new form of mortgage will be a better security than the old one. Under the present system a mortgagee under a deposit of deeds takes subject to all prior equities, whether he has notice of them or not. Under sec. 8 sub-sec. 4 of the Act of 1897 a mortgagee, by deposit of a land certificate, would seem to oust all equities prior to the date of the certificate which are not entered on it, and this would seem to enable a fraudulent trustee whose *cestuis que trusts* have not entered cautions, to give a valid charge on the trust estate. On the other hand, a mortgagee by deposit of the land certificate, does not gain priority over charges entered since the date of the certificate, and is bound to make enquiries as to subsequent charges, from the registrar, which he can do, however, by telegram. He must also — and this is of the

utmost importance — give a notice to the registrar by registered letter or otherwise of his mortgage. Curiously enough, the common case of a mortgage by deposit with a bank, to secure an overdraft, is not specifically dealt with; and it may be plausibly argued that in such cases the banker would have on each occasion of cashing a cheque, to search the register for subsequent incumbrances. I think, however, that this cannot be so, as the effect would be to make such charges absolutely useless, and to dislocate commerce in the most disastrous manner. The true view seems to me to be, that a mortgagee by deposit to secure a current account, having notified his charge to the registrar, may safely continue to make advances until he receives actual notice to stop from a subsequent incumbrancer.

Such is a brief review of the new conveyancing, which, like the new woman, is still somewhat of an experiment. Some nervous practitioners fancy that it is the Banshee whose appearance portends the death of that quiet and respectable figure, the conveyancing counsel. I myself have no such fears. So long as the English land laws retain their present complexity experts will be required to advise upon them; and so long as wills, settlements, and leases, not to mention partnership deeds and contracts, have to be drawn, the wise saying of King Solomon will hold good that "without counsel purposes are disappointed."

PART IX.

WILLS, DESCENT, MARRIAGE

72. The Mediæval Law of Intestacy.

CHARLES GROSS

73. Executors in Earlier English Law.

OLIVER WENDELL HOLMES, JR.

74. The Executor in England and on the Continent.

ROBERT CAILLEMER

75. The Rise of the English Will.

MELVILLE MADISON BIGELOW

76. Marriage and Divorce under Roman and English Law.

JAMES BRYCE

[Other References on the Subjects of this Part are as Follows:

The Testamentary Executor in England and Elsewhere, by R. J. R. Goffin (Yorke Prize Essay, 1899), London, 1891.

Outline of the Development of Probate Law and Probate Jurisdiction in New Hampshire, 1623-1775 (New Hampshire State Papers, 1907, vol. XXXI, Wills and Probates).

Two Essays on Primogeniture, by C. S. Kenny and P. M. Lawrence, London, 1878.

The Origin of Cy Pres, by Joseph Willard (Harvard Law Review, VIII, 69), 1894.

Changes in the Law of Wills and Descent in the United States, by L. M. Daggett (c. VIII, in Two Centuries' Growth of American Law, Yale Bi-Centenary Studies), 1901.]

72. THE MEDIÆVAL LAW OF INTESTACY[1]

By Charles Gross[2]

DURING the middle ages the last will was usually the epilogue of the last confession.[3] The intestate was regarded with horror as an infamous person who had died unconfessed. For if he had made confession on his death-bed, the priest before granting absolution would have persuaded the dying man to make a will by which he would bestow a part of his movables on the church and the poor for the repose of his soul.[4] The intestate, therefore, must have died without providing for his salvation; he could not be buried in consecrated soil, and in some parts of Europe his personal property was forfeited to his feudal lords.[5] In

[1] This Essay was first published in the Harvard Law Review, 1904, XVIII, pp. 120-131.

[2] Professor of History in Harvard University. Williams College, A. B. 1878, LL. D. 1904; Göttingen University, Ph. D., 1883.

Other Publications: The Gild Merchant, 1890; Select Cases from the Coroners' Rolls (Selden Society), 1896; The Sources and Literature of English History, 1900; Select Cases on the Law Merchant (Selden Society, 1908); Modes of Trial in Mediaeval Boroughs (Harvard Law Review, XV, 691) 1902; The Court of Piepowder (Quarterly Journal of Economics, XX, 231), 1906; Mortmain in Mediaeval Boroughs (American Historical Review), 1907.

[3] Auffroy, Évolution du Testament en France, 555; *cf. ibid.*, 376-84. "Very often a man makes no will until he feels that death is near": Pollock and Maitland, English Law, 2nd ed., ii. 340.

[4] The prelates order that when a man makes a will he should dispose of part of his property for the good of his soul; also that a priest should be present when a will is made: Wilkins, Concilia, i. 583, 638, ii. 155, 156.

[5] Du Cange, Glossarium, s. v. *intestatio;* Établissements de Saint Louis, ed. Viollet, iv. 42-49; Caillemer, Confiscation et Administration des Successions par les Pouvoirs Publics, 43-54; Pollock and Maitland, bk. ii. ch. vi. § 4. Caillemer believes that in some parts of France the confiscation of the intestate's goods by the lord was not a punishment for a religious offense, but a stage in the development by which serfs obtained the right to dispose of their property.

England during the first half of the thirteenth century the prelates secured the right to distribute such property, but a statute of 1357 required the ordinary to commit the work of administration "to the next and most lawful friends of the dead," who were to make provision for the welfare of his soul and were accountable to the ordinary. The rule was after payment of debts to give a third of his movables to the wife and a third to the children (the bairns' part), while the other third (the dead's part) was expended for pious works; if he left a wife but no children, or children but no wife, the dead's part was a half.[1]

It has recently been asserted that intestacy was rare in England because it was easy to make a will and because the chroniclers treat intestacy as a scandal.[2] While the paucity of references to intestates in the records tends to confirm this view, most of the cases referred to by the chroniclers seem to relate to men who had fair warning that death was approaching, not to those who died suddenly; and the coroners' rolls show that such sudden deaths were very common. Therefore, since a man usually made his will on his death-bed,[3] intestacy could not have been rare; and the records which we shall soon examine show clearly that intestates who died suddenly were regarded with less horror than those who died under normal conditions.

Much obscurity overhangs the English law of intestacy before the thirteenth century. Blackstone, adopting the opinion of Coke,[4] says that "by the old law the king was entitled to seize upon his [the intestate's] goods, as the *parens patriae* and general trustee of the kingdom."[5] On the other hand, Selden and Pollock and Maitland deny that this was ever a prerogative of the crown. Though Coke's

[1] On the history of the English law of intestacy, see Selden, The Disposition of Intestates' Goods (Collected Works, iii. 1677); Moore, Reports of Cases heard by the Judicial Committee of the Privy Council, v. 434-98; Makower, Const. Hist. of the Church of England, 428-31; Pollock and Maitland, bk. ii. ch. vi. § 4 (the best account of the subject); on the history of legitim, *ibid.*, bk. ii. ch. vi. § 3.

[2] Pollock and Maitland, ii. 360, rejecting Selden's opinion that intestacy was common.

[3] *Ibid.*, ii. 340.

[4] Reports, ix. 38 b.

[5] Commentaries, bk. ii. ch. 32.

contention appears to be untenable, it would not have been strange if the strong English monarchy, adopting the principle of the Norman law, had insisted that the movables of intestates should be dealt with in the same way as those of deceased usurers. The Grand Coutumier of Normandy says that all the chattels of those who, after an illness of nine days or more, die unconfessed, belong to the duke, though some lords possess this right by charter or prescription;[1] and, according to an inquest made by order of Philip Augustus in 1205 regarding the laws which Henry II. and Richard I. had observed in Normandy, all the movables of an intestate who lay ill in bed three or four days before his death were forfeited to the king or to the lord.[2] In 1190 the clergy of Normandy claimed, however, that if any one dies suddenly without leaving a will his personal estate should be distributed by the church.[3] This was evidently a mooted question in Normandy regarding which there were disputes between the lay and ecclesiastical authorities.

Certain passages may be found in the records which at first view seem to lend some support to the theory of Coke and Blackstone, but when carefully scrutinized they fail to carry conviction. For example, in 1255 Henry III. grants to the burgesses of St. Omer that if any of them shall die in the king's dominions testate or intestate, he will not confiscate their goods, but will allow their heirs to have them;[4] probably Henry III. is here merely safeguarding the men of St. Omer against reprisals.[5] In 1268 the citizens of Dublin contended that the movable property of intestates belonged to the crown, but for this and other misdemeanors they were excommunicated.[6] Moreover, various passages in

[1] Coutumiers de Normandie, ed. Tardif, ii. 56, ch. 20.

[2] "Omnia mobilia ipsius domini regis debent esse aut illius in cujus terra est": Teulet, Layettes du Trésor des Chartes, i. no. 785; Duchesne, Hist. Norm. Scriptores, 1060 *cf.* Tardif, Coutumiers de Normandie, i. pt. ii. 93; Delisle, Cat. des Actes de Philippe-Auguste, no. 961.

[3] "Distributio bonorum ejus ecclesiastica auctoritate fiet": Ralph of Diceto, Imagines Historiarum (Rolls Series), ii. 88.

[4] Cal. of Charter Rolls, i. 441.

[5] *Cf.* Rot. Lit. Claus., i. 620.

[6] "Nullus praelatus vel judex ecclesiasticus . . . de bonis eorum qui intestati decedunt se aliquatenus intromittat, sed fisco bona hujusmodi applicentur": Gilbert, Historic Documents (Rolls Series), 181; Chartae Hiberniae, 32.

the rolls of the twelfth and thirteenth centuries show that the chattels of intestates were sometimes seized by the king,[1] but in these cases he was probably exercising this right because he was the feudal lord. In 1284 Edward I. craved a grant of the goods of intestates from Pope Martin IV., to help pay the expenses of his proposed crusade, and met with a refusal,[2] though a grant of this sort had been made in 1256.[3] These negotiations with the papacy imply that Henry III. and Edward I. did not regard such goods as the property of the crown.

The evidence at our disposal indicates that, according to the older law of England, the personal property of the intestate was forfeited to the feudal lord. Cnut's doom seems to imply that already before the Norman Conquest the lords were trying to obtain this right: "If anyone dies intestate, be it through his neglect or through sudden death, then let not the lord draw more from his property than his lawful heriot; and according to his direction let the property be distributed very justly to the wife and children and relations."[4] Domesday Book tells us that in the time of

[1] "Aldredus de Muchelegate debet lx. marcas de catallis Reginaldi qui obiit in domum suam (*sic*) sine divisa": Pipe Roll, 16 Hen. II. p. 46. "Rogerus [de Floketorp] cepit de Emma quae fuit uxor Hugonis Flaxenebert de Kyneburl' per manum Eustacii Noth de eadem, executoris dicti Hugonis, eo quod imposuit eis quod dictus Hugo decessit intestatus et quod medietas bonorum suorum fuit domino regi, et ideo cepit xx. s. ad opus suum proprium": 3 Edw. I., Rotuli Hundredorum, i. 447. This was wrongfully exacted, for a jury found that Hugh had died testate. Roger was the bailiff of a manor that had escheated to the king. See *ibid.*, i. 445, 449. See also Rot. Lit. Claus., i. 537 (writ, 7 Hen. III., stating that Richard Fitzdune did not die intestate, and therefore his chattels seized on behalf of the king are to be given to his executors); Close Roll, 17 Hen. III., cited by Selden, Works, iii. 1682 (writ ordering that a parson is to have his mortuary out of the chattels of Robert de Weston, who died intestate). It is difficult to accept Selden's contention that the writ of 7 Hen. III. refers to seizure for a debt due to the king.

[2] Cal. of Papal Registers, i. 474.

[3] "Omnia bona mobilia ab intestato decedentium sive de regno Angliae sive de aliis terris [regis Angliae] . . . pro illa portione quae juxta patriae consuetudinem decedentes contingit . . . ad opus . . . regis Angliae ut votum suum efficacius exequi valeat": Rymer's Foedera (Rec. Com.), i. 345. In 1248 Innocent IV. decreed that the goods of intestates should be set aside by the bishops for the needs of the Holy Land: Fournier, Les Officialités, 89. At the parliament of Carlisle, in 1307, complaint was made that officers of the pope demand for his use all the goods of intestates: Rotuli Parl., i. 220.

[4] Cnut's Laws, ii. ch. 70: Liebermann, Gesetze, i. 356.

Edward the Confessor the king could seize all the goods of his citizens of Hereford dying without a will.[1] The rule set forth in Leis Willelme, ch. 34, that the children of an intestate shall divide the inheritance among them equally,[2] may be construed as an assertion against the claims of the lords. The coronation charter of Henry I. says that if any royal vassal meets a sudden death by arms or sickness and makes no disposition of his effects (*pecunia*), his wife, children, kinsmen, or liege men shall distribute them for the good of his soul.[3] This regulation applies only to royal vassals, and it seems to imply that, except in cases of sudden death, the king as lord might exercise the power of confiscation.[4] Glanvill clearly states that when any one dies intestate all his chattels are understood to belong to his lord,[5] and this seems to be confirmed by some entries in the Pipe Rolls of Henry II.[6] The chapter of John's Great Charter enacting that the chattels of a free man who dies intestate should be distributed by the hands of his near kinsmen or friends under the supervision of the church,[7] seems to have transferred power from the king and other lords to the prelates; and, though this chapter was omitted in the confirmations of the charter, probably because it collided with the interests of the lay lords, the church exercised the right to distribute the personal property of intestates since the sec-

[1] Below, p. 126, n. 5.

[2] Liebermann, Gesetze, i. 514.

[3] *Ibid.*, i. 522. According to King Stephen's charter, the goods of intestate clerics were to be distributed for the benefit of the soul by the counsel of the church: Stubbs, Select Charters, 120; *cf.* Pollock and Maitland, English Law, 2nd ed., i. 519. In 1190 the clergy of Normandy claimed that such goods do not belong to the secular power, but should be distributed by episcopal authority for pious uses: Ralph of Diceto, Imagines Hist., ii. 87.

[4] According to the Grand Coutumier of Normandy and the Établissements de Saint Louis, *desperati* or *inconfessi* do not forfeit their movables in case of sudden death, but only after a fatal illness of eight or nine days: Auffroy, Évolution du Testament, 556; Du Cange, s. v. *intestatio*. See also the rule laid down by the clergy of Normandy in 1190 and the inquest made in 1205, above, p. 121.

[5] Bk. vii. ch. 16: "Cum quis vero intestatus decesserit omnia catalla sua sui domini esse intelliguntur; si vero plures habuerit dominos, quilibet eorum catalla sua recuperabit quae in feodo suo reperiet."

[6] 18 Hen. II., pp. 98, 133.

[7] Stubbs, Select Charters, 300, ch. 27.

ond quarter of the thirteenth century[1] and perhaps since the early part of Henry III.'s reign. The constitutions of Walter of Cantilupe, bishop of Worcester (1240), assert that the distribution should be made under the supervision of the lord and him whom the bishop shall have deputed for that purpose.[2] This arrangement looks like a compromise in a struggle between the barons and the prelates or between the principles set forth in Cnut's doom and in John's charter. Bracton's statement of the law of his time is also reminiscent of the older law: "If a free man dies intestate and suddenly, his lord should in no wise meddle with his goods, save in so far as this is necessary in order that he may get what is his, namely, his heriot, but the administration of the dead man's goods belongs to the church and to his friends, for a man does not deserve punishment although he has died intestate."[3]

There are, moreover, indications that in Bracton's day and later the lords remembered their old right, and sometimes tried to assert it in defiance of the church. In the articles presented to Henry III. by the bishops in 1257, it is stated that the king and other feudal lords seize the goods of intestates, and do not permit their debts to be paid or the residue to be applied by the ordinary to the use of the children or kinsmen and to other pious uses.[4] Lords who do this were threatened with excommunication at the Council of Merton in 1258, and at the Council of Lambeth in 1261.[5] In 1279 Archbishop Peckham rebukes Llewellyn, prince of Wales, for confiscating "*bona intestatorum vestrorum*";[6] and in 1305 the bishop of Llandaff complains to Edward I. that the magnates will not allow him to admin-

[1] In 1239 a rule is made regarding the administration of the goods of intestates in the absence of the bishop: Wilkins, Concilia, i. 664.

[2] *Ibid.*, i. 675.

[3] Bracton, *f.* 60 b, ed. Twiss, i. 480. Bracton's text is open to the interpretation that if intestacy is not occasioned by sudden death it may be a cause of forfeiture.

[4] Matthew Paris, Chronica Majora, ed. Luard, vi. 358; Wilkins, Concilia, i. 728; *cf. ibid.*, i. 724.

[5] *Ibid.*, i. 740, 754; *cf. ibid.*, ii. 705.

[6] Registrum J. Peckham, i. 77.

ister the goods of intestates.[1] The lords also continued, in some parts of England at least, to confiscate the chattels of their villeins dying intestate.[2]

In the marches of Wales the old law in favor of the lords seems to have been maintained long after the reign of Edward I. In 1278 the lord of Kemes agreed to waive his claim to the property of intestates.[3] In 1352 Edward III. ordered three commissioners to inquire whether Sir Henry Hastings, a tenant-in-chief, and others died intestate, and whether, according to the custom of the marches of Wales, all the chattels of tenants dying intestate belonged to their lords. A jury sworn before two of the commissioners in 1354 declare that from time immemorial it has been customary for the lords to have all such chattels.[4] They say that Sir Henry left a will, but that Grono ap Ievan died intestate during the present reign; his chattels are worth 40*s*.[5] An attempt was made to enforce the old custom as late as the reign of Edward VI.[6]

Attention must finally be called to the town charters, which, though they contain many references to intestacy, have been passed over in silence by all writers on this subject. Their examination will confirm the view that long after Bracton wrote his law-book the king and other lay lords still remembered their old right, and that their ten-

[1] Memoranda de Parliamento, 1305, ed. Maitland, 73. The king answered that he would not interfere with the custom of the country, meaning perhaps the custom of Wales. For conflicts arising from the claims of the prelates in France, see Auffroy, Évolution du Testament, 558-60.

[2] Court Rolls of the manor of Wakefield, ed. Baildon, i. 256, 260; Rotuli Hundredorum, ii. 758; Pollock and Maitland, 2nd ed., i. 417. Some lords did not permit their serfs to make wills or impeded their execution: Letters from Northern Registers, 73; Wilkins, Concilia, i. 724, 740, 754, ii. 155, 553, 705.

[3] "Item si aliquis liber homo de Kemeis decedat intestatus praedictus dominus nihil habebit de bonis intestati": Baronia de Kemeys (Cambrian Archaeol. Assoc.), 59.

[4] "Consuetudo est in marchia Walliae optata [? obtenta] et usitata quod domini partium illarum omnia bona et catalla tenentium suorum in partibus illis intestatorum decedentium ratione dominii sui praedicti habent et habere consueverunt a tempore quo non extat memoria."

[5] Baronia de Kemeys, 14, 71.

[6] *Ibid.*, 15. In 1485 we hear of the office of selling goods of intestates in the county of Flint, — an office which seems to have been in the gift of the king: Rotuli Parl., vi. 353.

ants, in the boroughs at least, regarded exemption from its exercise as a privilege. The following list of references to the evidence on this subject does not profess to be exhaustive.[1]

Bala, 1289: Record of Caernarvon, 175.
Bath, 1256: Warner, History of Bath, app. xlv.
Beaumaris, 1296: Record of Caernarvon, 159.
Bere, 1284: Archaeologia Cambrensis, 1849, iv. 216.
Bristol, 1256: Seyer, Charters of Bristol, 22.
* Cardiff, before 1183: Clark, Cartae de Glamorgan, iii. 78.[2]
Cardigan, 1284: Placita de quo Warranto, 821.
Carmarthen, 1257: Charters of Carmarthen, 7.
Carnarvon, 1284: Record of Caernarvon, 185.
* Chester, *c.* 1200: Hist. MSS. Com., viii. 356.[3]
Chester, 1300: *ibid.*, viii. 357.[3]
Conway, 1284: Record of Caernarvon, 163.
Cork, 1242: Chartae Hiberniae, 25.[4]
Criccieth, 1284: Record of Caernarvon, 197.
Flint, 1284: Taylor, Notices of Flint, 32.
Guildford, 1257: Cal. of Charter Rolls, i. 456.
Harlech, 1284: Record of Caernarvon, 193.
* Haverfordwest, 1219-31: English Hist. Review, xv. 518.[5]
Haverfordwest, 1291: *ibid.*
Hereford, 1086: Domesday Book, i. 179 a.[6]
* Kells, *temp.* John: Chartae Hiberniae, 17.[7]
* Kidwelly, 1329: Archaeologia Cambrensis, 1856, ii. 276.[8]
Kingston-upon-Thames, 1256: Roots, Charters of Kingston, 28.
* Laugharne, 1300: Archaeologia Cambr., 1879, x. suppl. xlii.
Newborough, 1284: Record of Caernarvon, 179.

[1] The references are to town charters, excepting those concerning Cardiff, Hereford, Preston, and Tewkesbury, which are to customals or to Domesday Book. The asterisk indicates that the privilege was granted by a baron. Where there is no asterisk the reference is to a royal charter, except in the cases of Hereford and Preston.

[2] "Item quacunque morte burgensis praeoccupatus fuerit, nisi per nequitiam dampnatus, uxor ejus et liberi sui habebunt catalla mortui vel proximi parentes ipsius tanquam heredes si non habuerit uxorem vel liberos." From a customal of the twelfth century.

[3] "Et si aliquis civis de praedicta civitate in servitio meo occisus fuerit, de catallis suis fiat ac si ipse rationabile testamentum fecisset."

[4] Whether they die testate or intestate, the goods of the citizens are not to be confiscated by the king but are to go to their heirs.

[5] "Heres burgensis quacumque morte praeoccupati habeat hereditatem et catallum patris sui."

[6] "Si quis morte praeventus non divisisset quae sua erant, rex habebat omnem ejus pecuniam."

[7] "Quicumque praedictorum burgensium de K. sive in terra sive in mari testatus vel intestatus obierit, heres ipsius duodecim denarios in relevium pacabit et hereditatem suam quiete possidebit."

[8] Henry, duke of Lancaster, grants, 2 Edw. [III.], that if any burgher should die intestate his son and heir shall have his property "without challenge of us or our heirs."

* Newport (Pembrokesh.), 1192(?): Baronia de Kemeys, 15, 50.[1]
Northampton, 1257: Cal. of Charter Rolls, i. 459.
Oswestry, 1398: Shropsh. Archaeol. Soc., Trans., ii. 192.
* Oswestry, 1407: *ibid.*, ii. 199.
Oxford, 1257: Ogle, Royal Letters, 11.
Pembroke, *temp.* Hen. II.: Cal. of Patent Rolls, 1377-81, p. 107.[2]
Preston, *temp.* Hen. II. (?): English Hist. Review, xv. 499.[3]
Rhuddlan, 1279: Cal. of Patent Rolls, 1272-81, p. 324.
* Saltash, *temp.* Hen. III.: Luders, Reports, ii. 119.[4]
Shrewsbury, 1256: Owen and Blakeway, Hist. of Shrewesbury, i. 121.
Stamford, 1257: Cal. of Charter Rolls, i. 472.
* Tenby, *temp.* Hen. III.: English Hist. Review, xvi. 103.[5]
* Tewkesbury, before 1183: Clark, Cartae de Glamorgan, iii. 78.[6]

The same formula is used in the royal charters with few exceptions:[7] the king promises that if any burgesses should die within his dominions testate or intestate, he will not cause their chattels to be confiscated, but the heirs shall have them intact, in so far as it can be shown that they belonged to the deceased, provided that sufficient knowledge or proof of the heirs can be had.[8] Perhaps the demand for this privilege

[1] "Item si burgensis moritur de quacunque morte morietur, nisi per judicium pro felonia vitam suam amittat, ego nihil habebo de catallo nisi relevium scilicet xii. d."

[2] "Et [si] burgensis ejusdem villae quacumque morte et quocumque loco sive in terra sive in mari sive cum testamento sive sine testamento moriatur, heres suus omnes res suas habeat per donandum xii. d. de relevio."

[3] "Si burgensis de villa morte subitanea obierit, uxor ejus et heredes sui omnia catalla sua et terras suas quiete habebunt. Ita quod dominus suus nec justiciarii manum ponant in domibus vel in catallis defuncti nisi publice excommunicatus fuerit, sed consilio sacerdotis et vicinorum in elemosinis expenduntur."

[4] Reginald de Valle Torta grants to his burgesses: "et quisquis illorum obierit de quacunque morte fuerit, heres ejus catalla ipsius in pace habebit et terram suam per triginta denarios releviabit ad plus."

[5] "Concedimus quod si quis burgensium praedictorum morte subita, quod absit, moriatur, omnia catalla sua sibi fore salva et heredem suum in hereditatem suam per relevium xii. d. libere introire."

[6] Customal of Cardiff and Tewksbury. See above, under Cardiff.

[7] The exceptions are Chester, Cork, and Pembroke. In the charters of Chester and Cork the formula is merely abbreviated.

[8] "Si dicti burgenses aut eorum aliqui infra terram et potestatem nostram testati decesserint vel intestati, nos vel heredes nostri bona ipsorum confiscari non faciemus, quin eorum heredes ea integre habeant, quatenus dicta catalla dictorum defunctorum fuisse constiterit, dum tamen de dictis heredibus notitia aut fides sufficienter habeatur." This formula is also used in the baronial charters of Laugharne and Oswestry, and in a grant made by Henry III. to the burgesses of St. Omer (Cal. of Charter Rolls, i. 441); instead of "heirs" the charter of Oswestry (1407) has "heirs and executors." The formula, as set forth above, should be compared with that of a charter granted during the reign of Henry II. by his son Richard to the men of La Rochelle: "Quicumque ex illis

was stimulated in 1256-57 and 1284 by the negotiations between the crown and the papacy.[1] The charters of baronial towns which state that the chattels of burgesses who die suddenly or "by any sort of death" shall go to their heirs, doubtless refer to cases of intestacy. A grant of Henry II. to La Rochelle tells us that a burgher who breaks his neck or is drowned has not an opportunity to confess and make his will; therefore his property is to be distributed by his kinsmen and friends for the good of his soul.[2]

The town records of England give little information concerning the disposition of the goods of the intestate. The rule laid down in the Preston customal seems to mean that out of his estate provision was to be made for the benefit of his soul by the parish priest and the dead man's friends or kinsmen.[3] According to the customal of Sandwich, which probably records the usages of the fourteenth and fifteenth centuries, the mayor and jurats have the administration of the *bona intestatorum* in the following manner. The mayor takes with him the jurats and sometimes the rector or vicar of the dead man's parish, and they ascertain what he possessed in money, goods, and debts at the time of his death. Then they appoint two executors, who are sworn to make an inventory. After payment of debts and funeral expenses, the residue is divided into three equal parts, if there is a wife and children; into two equal parts, if there is a wife

sive testatus sive intestatus sive confessus sive non morietur, omnes res ejus et possessiones integre et quiete remaneant heredibus suis et gënero suo" (Ordonnances des Rois, xi. 318, from the inspeximus of Louis VIII., 1224). An inspeximus of Alphonse of Poitiers, 1241, adds the words "id est" after "intestatus": Besly, Histoire des Comtes de Poitou, 500. For other grants of this privilege to French towns, see Ordonnances des Rois, xi. 319, 321, 337, 495; Auffroy, Évolution du Testament, 557.

[1] Above, p. 122.

[2] "Si vero aliquis eorum colli fractione vel submersione vel aliquo casu subita morte praeventus fuerit et spatium confitendi non habuerit, concedo ut secundum rationabilem dispositionem et considerationem parentum et amicorum suorum res suae distribuantur et eleemosynae fiant pro anima ipsius": Ordonnances des Rois, xi. 319. See also the claim of the clergy of Normandy in 1190, in Ralph of Diceto, Imagines Hist., ii. 88: "Si quis vero subitanea morte vel quolibet alio fortuito casu praeoccupatus fuerit, ut de rebus suis disponere non possit, distributio bonorum ejus ecclesiastica auctoritate fiet."

[3] Above, p. 127, n. 2.

but no children. Then the dead man's part (the third or half) is distributed for the benefit of his soul; and finally the executors render an account before the mayor and jurats, the friends or kinsmen, and the rector or vicar, if they desire to be present. The record adds that this practice has been in use from ancient times without any contradiction on the part of the archdeacon of Canterbury or any other ordinary.[1] The dead man's part was probably expended for pious uses in other towns, like London, York, Chester, Bristol, Dublin, and Newcastle-upon-Tyne, where the tripartite division of the chattels of a man with wife and children existed.[2] But Bracton, after speaking of the law of intestacy and the tripartite division of chattels, vaguely intimates that other

[1] "Ita semper quod de bonis ipsi defuncto pro portione accidentibus fiat testamentum per visum et auxilium amicorum suorum, si interesse voluerint, et distributio [sit] per manus ipsorum executorum debita et fidelis [secundum quod] credunt quod voluntas sua fuerit dum vixerit, et ad elemosinam et vias emendendas pro anima sua juxta bonorum quantitatem. . . . Et haec solent fieri ab antiquo usque ad nunc sine aliqua contradictione domini archidiaconi Cantuariensis vel alicujus alterius ordinarii": Boys, Hist. of Sandwich, 524-5. In some parts of France the priest or the kinsmen might make a will on behalf of the intestate: Auffroy, Évolution du Testament, 557; Recueil des Monuments Inédits, ed. Thierry, iv. 408. Many bequests were made by the citizens of Bristol for the repair of highways: Wadley, Abstracts of Wills, *passim*. Another chapter of the Sandwich customal says that the movables of orphans are at the disposition of the mayor and jurats, "quia apud nos catalla et bona mobilia non accidunt hereditarie heredibus defuncti prout accidunt tenementa, redditus et possessiones," but a portion of such chattels is set aside for masses, the repair of roads, and similar works of charity; thus in 1351 two-thirds were distributed in this way, and only one-third went to the heirs: Boys, 514.

[2] For London, York, and Chester, see Sharpe, Cal. of Wills, i. p. xxxiii.; Pollock and Maitland, English Law, 2nd ed., ii. 350; Widdrington, Analecta Eboracensia, 68, 300; Statutes of the Realm (Rec. Com.), vi. 372. The rule laid down in the Chester charter (*c.* 1200, above, p. 126) seems to imply that there was a definite division of the chattels in that city. The Bristol wills often make a threefold division of movables: Wadley, Abstracts of Wills, p. 104, "tertia vero pars sit mihi hoc modo"; *cf. ibid.*, pp. 49, 75-77, 81, 90, 91, 100, 103, etc. For "the dead's portion" (a third) at Dublin, see Gilbert, Cal. of Records, i. 129, 131. The custom of Newcastle-upon-Tyne, that the third part of all the goods of a burgher should be inherited by his children, was adopted by the Scotch burghs: Ancient Laws of the Burghs of Scotland, ed. Innes, 55, 172. Pollock and Maitland, ii. 362, believe that the eldest son or heir could claim no bairn's part; but, according to the Newcastle custom, he was to have the same portion of the goods as any of the other children. The Leges Burgorum, ch. 116, also give a long list of heirlooms or *principalia* which he inherits: Ancient Laws, 56, *cf. ibid.*, 171.

rules prevailed in some boroughs and cities.[1] Most of the records say that the personal property of the intestate shall go to his heirs or to his wife and children, without specifying any limitation or legitim. The heirs would, however, probably regard it as a religious duty to do something for the repose of the intestate's soul; and, as at Preston, this would naturally be done with the help or advice of the parish priest. But we hear nothing of the intervention of the ordinary, except at Dublin in 1268, when the citizens resented it;[2] and the Sandwich customal expressly excludes any intervention of this sort. Such opposition to the assertion of episcopal authority was to be expected in towns the magistrates of which had the probate of wills. In many boroughs during the thirteenth and fourteenth centuries the municipal magistrates pronounced on the validity of wills[3]

[1] Bracton, f. 61; Fleta, bk. ii. ch. 57, § 10; *cf.* Pollock and Maitland, ii. 350, for a criticism of Bracton's statement regarding London.

[2] Above, p. 122. In the same year the citizens of London were excommunicated for admitting wills to probate in the hustings: Liber de Antiquis Legibus, 106.

[3] For probate in the hustings of London from 1256 onward, see Sharpe, Cal. of Wills, i. pp. xlii-xlvi; Liber Albus, 180, 403, 407; Ricart's Kalendar, 97-99; Pollock and Maitland, ii. 331. See also Domesday of Ipswich, ed. Twiss, 70-86; Bacon, Annals of Ipswich, 10, 16, 25-27, 41-46, 50-55, 59-61, 68-73, etc. (wills proved from 1269 onward); Placitorum Abbreviatio, 211, 216, 235 (Canterbury, Oxford, and London, *temp.* Edw. I.); Little Red Book of Bristol, ed. Bickley, i. 32, 52-54 (ordinance concerning probate, 1344, etc.); Hist. MSS. Com. xi. pt. iii. 188 (grant by Edw. II. that wills touching tenements in King's Lynn shall be proved and enrolled before the mayor); Owen and Blakeway, Hist. of Shrewsbury, i. 382; Oliver, Hist. of Exeter, 222; Widdrington, Analecta Eboracensia, 71. These references suffice to modify or confute the opinion of Bracton and the decision of the royal judges, 19 Edw. I. (Pollock and Maitland, ii. 330), that the jurisdiction over bequests of burgage tenements belonged to the ecclesiastical courts. In some boroughs a will was proved first before a representative of the bishop, and afterwards before a town magistrate in the gildhall: Wadley, Abstracts of Bristol Wills, 3, 5, 7, etc.; Manship, Hist. of Yarmouth, 405; Bacon, Annals of Ipswich, 41; Tighe and Davis, Annals of Windsor, i. 324; Registers of Walter Bronescombe, etc., ed. Hingeston-Randolph, 436 (Exeter); Hist. MSS. Com., xi. pt. iii. 233-4 (King's Lynn). Perhaps a canon of Boniface's Constitutions (1261, Wilkins, Concilia, i. 754; *cf. ibid.*, i. 550, ii. 705) may be directed against this practice: "Item testamentis coram ordinariis locorum probatis et approbatis eorundem probatio seu approbatio testamentorum a laicis nullatenus exigatur." Though the records emphasize the claim of the burgesses that wills devising burgage tenements should be proved in the borough court, many of the wills thus proved (for example, at London, Bristol, and King's Lynn) bequeathed chattels only, or both chattels and land.

and administered justice on behalf of the legatee whose legacy was withheld,[1] though this jurisdiction was evidently regarded with disfavor by the prelates.[2] The municipal authorities before whom wills were proved would naturally claim the right to administer the intestate's property. "The right to regulate the administration of intestates was too closely connected with the testamentary jurisdiction to be conveniently sevarated from it." [3]

While we have tried to show that there are indications of a struggle of the feudal lords to obtain or maintain their right to confiscate the chattels of intestates — a struggle which lasted from the time of Cnut to the time of Edward I., and of which we still find reminiscences in the records of the fourteenth century, — the main object of this paper has been to call attention to the fact that throughout the thirteenth century many boroughs were purchasing from their lords a favor or privilege which, according to Bracton, was the right of every free man. In the very decade when Bracton was asserting that the lord shall not meddle with the intestate's goods, the lords were selling a burghal franchise which implied that they had the right to seize such goods. The importance of personal property in boroughs, which was due to the predominance of mercantile over agricultural interests, would naturally make both the lords and the burgesses inclined eagerly to assert their claims against the pretensions of the prelates. The old law of intestacy, as set forth by Glanvill, pressed more heavily upon the tradesmen, whose wealth was made up mainly of chattels, than upon rural freeholders and villeins. It is not strange, therefore, that the town law since the thirteenth century strove to re-

[1] Since the first half of the fourteenth century we hear of actions in the borough courts by the writ *ex gravi querela* to recover bequests of burgage tenements: Little Red Book of Bristol, ed. Bickley, i. 33; Liber Assisarum, f. 232, 250; Law Quarterly Review, i. 265. As early as 1291 the legatee had a remedy in the borough court of Ipswich against the executors who would not give him seisin: Domesday of Ipswich, ed. Twiss, 72, 82.

[2] Liber de Antiquis Legibus, 106; Letters from Northern Registers, 71.

[3] Stubbs, in Report of Eccles. Courts Commission, 1883, p. xxiii. He makes this statement in speaking of the jurisdiction of the church tribunals.

ject the pretensions of both lords and prelates, and to establish the rule that the chattels of the intestate should go to his kinsmen, who would, however, be expected to devote a portion of his property to pious works for the atonement of his sins and the benefit of his soul.

73. EXECUTORS IN EARLIER ENGLISH LAW[1]

By Oliver Wendell Holmes, Jr.[2]

AT the present day executors and administrators hold the assets of the estate in a fiduciary capacity. Their rights and liabilities in respect of the fund in their hands, are very like those of trustees. But this way of regarding them is somewhat modern. I wish to call attention to several changes in the law which have taken place at different times and without reference to each other, for the purpose of suggesting that they are witnesses of an older condition of things in which the executor received his testator's assets in his own right. As usually is the case with regard to a collection of doctrines of which one seeks to show that they point to a more general but forgotten principle, there can be found a plausible separate explanation for each or for most of them, which some, no doubt, will regard as the last word to be said upon the matter.

I have shown elsewhere that originally the only person liable to be sued for the debts of the deceased, if they were disputed and had not passed to judgment in the debtor's lifetime, was the heir.[3] In Glanville's time, if the effects of the ancestor were not sufficient for the payment of his debts the heir was bound to make up the deficiency out of his own

[1] This Essay was first published in the Harvard Law Review, 1895, vol. IX, pp. 42–48.

[2] A biographical note of this author is prefixed to Essay No. 41, in Volume II of this Collection.

[3] Early English Equity, 1 Law Quart. Rev. 165. The Common Law, 348. Bracton 407 *b*, 61, 98 *a*, 101 *a*, 113 *b*. The article referred to in the Law Quarterly Review shows the origin and early functions of the executor. It is not necessary to go into them here.

property.[1] In the case of debts to the king, this liability continued as late as Edward III,[2] royalty like religion being a conservator of archaisms. The unlimited liability was not peculiar to England.[3] While it continued we may conjecture with some confidence that a judgment against the heir was not confined to the property which came to him from his ancestor, and that such property belonged to him outright. At a later date, M. Viollet tells us, the French customary law borrowed the benefit of inventory from the Roman law of Justinian. The same process had taken place in England before Bracton wrote. But in the earliest sources it looks as if the limitation of liability was worked out by a limitation of the amount of the judgment, not by confining the judgment to a particular fund.[4]

As was shown in the article above referred to, the executor took the place of the heir as universal successor within the limits which still are familiar, shortly after Bracton wrote. His right to sue and the right of others to sue him in debt seemed to have been worked out at common law.[5] It hardly needs argument to prove that the new rights and burdens were arrived at by treating the executor as standing in the

[1] "Si vero non sufficiunt res defuncti ad debita persolvenda, tunc quidem hæres ejus defectum ipsum de suo tenetur adimplere: ita dico si habuerit ætatem hæres ipse." Glanville, Lib. 7, c. 8. Regiam Majestatem, Book 2, c. 39, § 3.

[2] 2 Rot. Parl. 240, pl. 35. St. 3 Ed. I., c. 19.

[3] Ass. Jerus., Bourgeois, ch. cxciii. 2 Beugnot, 130. Paul Viollet, Hist. du Droit Franç., 2d ed. 829.

[4] Viollet, op. cit. The Common Law, 347, 348. "Hæres autem defuncti tenebitur ad debita predecessoris sui acquietanda eatenus quatenus ad ipsum pervenerit, sci. de hæreditate defuncti, et non ultra," &c. Bracton, 61 *a*.

"Notandum tamen est, quod nullus de antecessoris debito tenetur respondere ultra *valorem* huius, quod de eius hereditate dignoscitur possidere." Somma, Lib. 2, c. 22, § 5, in 7 Ludewig, Reliq. Manuscript. 308, 309. Grand Coustum. c. 88. Compare also St. Westm. II. (13 Ed. I.) c. 19, as to the liability of the ordinary; "Obligetur decetero Ordinarius ad respondendum de debitis, quatenus bona defuncti sufficiunt, eodem modo quo executores hujusmodi respondere tenerentur si testamentum fecisset." See the cases stated below. I know of no early precedents or forms of judgments against heirs. I wish that Mr. Maitland would give the world the benefit of his knowledge and command of the sources on the matter. Later the judgment against heirs was limited to assets descended. Townesend, Second Book of Judgments, 67, pl. 26.

[5] Y. B. 20 & 21 Ed. I. 374, 30 Ed. I. 238. 11 Ed. III. 142. Id. 186. (Rolls ed.)

place of the heir. The analogy relied on is apparent on the face of the authorities, and in books of a later but still early date we find the express statement, *executores universales loco hæredis sunt*,[1] or as it is put in Doctor and Student, "the heir, which in the laws of England is called an Executor."

Now when executors thus had displaced heirs partially in the courts, the question is what was their position with regard to the property in their hands. Presumably it was like that of heirs at about the beginning of the fourteenth century, but I have had to leave that somewhat conjectural. The first mode of getting at an answer is to find out, if we can, what was the form of judgment against them. For if the judgment ran against them personally, and was not limited to the goods of the deceased in their hands, it is a more than probable corollary that they held those assets in their own right. The best evidence known to me is a case of the year 1292, (21 Ed. I.) in the Rolls of Parliament.[2] Margery Moygne recovered two judgments against Roger Bertelmeu as executor of William the goldsmith. In the first case he admitted the debt and set up matter in discharge. This was found against him except as to £60, as to which the finding was in his favor, and the judgment went against him personally for the residue. In the second case the claim was for 200 marks, of which the plaintiff's husband had endowed her *ad ostium ecclesiæ*. The defendant pleaded that the testator did not leave assets sufficient to satisfy his creditors. The plaintiff replied that her claim was preferred, which the defendant denied. The custom of boroughs was reported by four burgesses to be as the plaintiff alleged, and the plaintiff had a judgment against the defendant generally. The defendant complained of these judgments in Parliament, and assigned as error that there came to his hands only £27 at most, and that the two judgments amounted to £40 and more. The matter was compromised at this stage, but enough appears for my purposes. If the defendant was

[1] Lyndwood, Provinciale. Lib. 3, Tit. 13. c. 5. (*Statutum bonæ memoriæ*), note at word, *Intestatis*. Dr. & Stud. Dial. 1, c. 19.

[2] 1 Rot. Parl. 107, 108. It may be remarked, by the way, that an excellent example of trustee process will be found in this case.

right in his contention, it would follow in our time that the judgment should be *de bonis testatoris*, yet it does not seem to have occurred to him to make that suggestion. He assumed, as the court below assumed, that the judgment was to go against him personally. The limitation for which he contended was in the amount of the judgment, not in the fund against which it should be directed.

There is some other evidence that at this time, and later, the judgment ran against the executor personally, and that the only limitation of liability expressed by it was in the amount. In the first case known to me in which executors were defeated on a plea of *plene administravit* it was decided that the plaintiff should recover of the defendants "without having regard to whether they had to the value of the demand."[1] Afterwards it was settled that in such cases the judgment for the debt should be of the goods of the deceased, and that the judgment for the damages should be general.[2] But whether the first case was right in its day or not, the material point is the way in which the question is stated. The alternatives are not a judgment *de bonis testatoris* and a general judgment against the defendants, but a judgment against the defendants limited to the amount in their hands, and an unlimited judgment against them.

But if it be assumed that a trace of absolute ownership still was shown in the form of the judgment, when we come to the execution we find a distinction between the goods of the testator and those of the executor already established. In 12 Edward III. a judgment had been recovered against a parson, who had died. His executors were summoned, and did not appear. Thereupon the plaintiff had *fieri facias* to levy on the chattels of the deceased in the executors' hands (*de lever ses chateux qil avoient entre mayns des biens la mort*), and on the sheriff returning that he had taken 20*s*. and that there were no more, execution was granted of the goods of the deceased which the executors had in their hands

[1] Y. B. 17 Ed. III. 66, pl. 83.

[2] Y. B. 11 Hen. IV. 5, pl. 11. Skrene in 7 Hen. IV. 12, 13, pl. 6. Martin in 9 Hen. VI. 44, pl. 26. Danby in 11 Hen. VI. 7, 8 pl. 12. Dyer, 32 *a*, pl. 2. 1 Roll. Abr. 931, D. pl. 3. 1 Wms. Saund. 336, n. 10.

on the day of their summons, or to the value out of the executors' own goods if the former had been eloigned.[1]

I now pass to two other rules of law for each of which there is a plausible and accepted explanation, but which I connect with each other and with my theme. In former days, I was surprised to read in Williams on Executors, that the property in the ready money left by the testator "must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value."[2] What right, one asked oneself, has an executor to deal in that way with trust funds? In this Commonwealth at least the executor would be guilty of a breach of duty if he mingled money of his testator with his own. Another passage in Williams shows that we must not press his meaning too far. It is stated that money of the testator which can be distinguished does not pass to a bankrupt executor's assignee.[3] The principal passage merely was repeated from the earlier textbooks of Wentworth and Toller. In Wentworth the notion appears to be stated as a consequence of the difficulty of distinguishing pieces of money of the same denomination from each other, — a most impotent reason.[4] There is no doubt that similar arguments were used in other cases of a later date than Wentworth.[5] But I prefer to regard the rule as a survival, especially when I connect it with that next to be mentioned.

As late as Lord Ellenborough's time it was the unquestioned doctrine of the common law that the executor was answerable absolutely for goods which had come into his possession, and that he was not excused if he lost them with-

[1] Y. B. 13 Ed. III. 398-401 (A. D. 1338), acc. 2 Rot. Parl. 397, No. 110 (Ed. III.). See also the intimation of Wychingham, J., in 40 Ed. III. 15, pl. 1. Fleta, Lib. 2, c. 57, § 6.

[2] 1 Wms. Exors. (7th ed.) 646. In the ninth edition this is qualified slightly by the editor in a note. (9th ed.) 566, 567 and n. (p).

[3] 1 Wms. Exors. 9th ed. 559. Howard *v.* Jemmett, 2 Burr. 1368, 1369, note; Farr *v.* Newman, 4 T. R. 621, 648.

[4] Wentworth, Executors (14th ed. Philadelphia, 1832), 198.

[5] Whitecomb *v.* Jacob, 1 Salk. 160; Ford *v.* Hopkins, 1 Salk. 283, 284; Ryall *v.* Rolle, 1 Atk. 165, 172; Scott *v.* Surman, Willes, 400, 403, 404. Rightly condemned *quoad hoc* in *Re* Hallett's Estate, 13 Ch. D. 696, 714, 715. See also Miller *v.* Race, 1 Burr. 452, 457, S. C. 1 Sm. L. C.

out fault, for instance, by robbery.[1] Now it is possible to regard this as merely one offshoot of the early liability of bailees which still lingered alive, although the main root had rotted and had been cut a century before by Chief Justice Pemberton, and by the mock learning of Lord Holt.[2] It is explained in that way by Wentworth,[3] who wrote before the early law of bailment had been changed, but with some suggestions of difference and mitigation. If this explanation were adopted we only should throw the discussion a little further back, upon the vexed question whether possession was title in primitive law. But it is undeniable that down to the beginning of this century the greatest common-law judges held to the notion that the executor's liability stood on stronger grounds than that of an ordinary bailee, and this notion is easiest explained as an echo of a time when he was owner of the goods, and therefore absolutely accountable for their value. In the Chancery, the forum of trusts, it is not surprising to find a milder rule laid down at an earlier date, and no doubt the doctrine of equity now has supplanted that of the common law.[4]

There is no dispute, of course, that in some sense executors and administrators have the property in the goods of the deceased.[5] I take it as evidence how hard the early way of thinking died that as late as 1792, the King's Bench were divided on the question whether a sheriff could apply the goods of a testator in the hands of his executor in execution of a judgment against the executor in his own right, if the sheriff was notified after seizure that the goods were effects of the testator. As might have been expected the judgment was that the sheriff had not the right, but Mr. Justice Buller delivered a powerful dissent.[6] A little earlier the same court decided that a sale of the testator's goods in execution of

[1] Crosse *v.* Smith, 7 East, 246, 258.

[2] King *v.* Viscount Hertford, 2 Shower, 172; Coggs *v.* Bernard, 2 Ld. Raym. 909. The Common Law, Lect. 5, esp. p. 195. Morley *v.* Morley, 2 Cas. in Ch. 2.

[3] Executors (14th ed.), 234.

[4] Lord Hardwicke in Jones *v.* Lewis, 2 Ves. Sen. 240, 241 (1751); Job *v.* Job, 6 Ch. D. 562; Stevens *v.* Gage, 55 N. H. 175. See Morley *v.* Morley, 2 Cas. in Ch. 2 (1678).

[5] Com. Dig. *Administration* (B. 10). Cf., Wms. Exors. (9th ed.) 558.

[6] Farr *v.* Newman, 4 T. R. 621.

such a judgment passed the title, and Lord Mansfield laid it down as clear that an executor might alien such goods to one who knew them to be assets for the payment of debts, and that he might alien them for a debt of his own. He added, "If the debts had been paid the goods are the property of the executor."[1]

Another singular thing is the form of an executor's right of retainer. "If an executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and rests in himself; that is, he has them as his own proper goods in satisfaction of his debt, and not as executor."[2] This proposition is qualified by Wentworth, so far as to require an election where the goods are more than the debt.[3] But the right is clear, and if not exercised by the executor in his lifetime passes to his executor.[4] So when an executor or administrator pays a debt of the deceased with his own money he may appropriate chattels to the value of the debt.[5] A right to take money would not have seemed strange, but this right to take chattels at a valuation *in pais* without judgment is singular. It may be a survival of archaic modes of satisfaction when money was scarce and valuations in the country common.[6] But it may be a relic of a more extensive title.

The last fact to be considered is the late date at which equity fully carried out the notion that executors hold the assets in trust. In 1750, in a case where one Richard Watkins had died, leaving his property to his nephew and nieces, Lord Hardwicke, speaking of a subsequently deceased nephew, William Watkins, said that he "had no right to any specific part of the personal estate of Richard what-

[1] Whale *v.* Booth, 4 Doug. 36, 46. See 1 Wms. Exors. (9th ed.) 561, note.

[2] Woodward *v.* Lord Darcy, Plowden, 184, 185.

[3] Executors, (14th ed.) 77, 198, 199.

[4] Hopton *v.* Dryden, Prec. Ch. 179. Wentw. Exors. (14th ed.) 77, note, citing 11 Vin. Abr. 261, 263; Croft *v.* Pyke, 3 P. Wms. 179, 183; Burdet *v.* Pix, 2 Brownl. 50.

[5] Dyer, 2*a*. Elliott *v.* Kemp, 7 M. & W. 306, 313.

[6] See, *e. g.*, the application of the trusteed wool to the judgment in 1 Rot. Parl. 108. Assignment of dower *de la pluis beale*, Litt. § 49. Delivery of debtor's chattels by sheriff, St. Westm. II. c. 18. Kearns *v.* Cunniff, 138 Mass. 434, 436.

ever; only a right to have that personal estate accounted for, and debts and legacies paid out of it, and so much as should be his share on the whole account paid to him; which is only a debt, or in the nature of a chose in action due to the estate of William." [1] In M'Leod *v.* Drummond [2] Lord Eldon says that Lord Hardwicke "frequently considered it as doubtful, whether even in the excepted cases any one except a creditor, or a specific legatee, could follow" the assets in equity. On the same page, Hill *v.* Simpson, 7 Ves. 152 (1802), is said to have been the first case which gave that right to a general pecuniary legatee.[3] Hill *v.* Simpson lays it down that executors in equity are mere trustees for the performance of the will,[4] but it adds that in many respects and for many purposes third persons are entitled to consider them absolute owners. Toward the end of the last century their fiduciary position began to be insisted on more than had been the case, and the common-law decisions which have been cited helped this tendency of the Chancery.[5]

The final step taken was taken in M'Leod *v.* Drummond,[6] when Lord Eldon established the rights of residuary legatees. "It is said in Farr *v.* Newman that the residuary legatee is to take the money, when made up: but I say, he has in a sense a lien upon the fund, as it is; and may come here for the specific fund." [7]

[1] Thorne *v.* Watkins, 2 Ves. Sen. 35, 36.
[2] 17 Ves. 152, 169 (1810).
[3] See also M'Leod *v.* Drummond, 14 Ves. 353, 354.
[4] P. 166. Note the recurrence with a difference to their original position in the early Frankish law. 1 Law Quart. Rev. 164.
[5] See also Scott *v.* Tyler, 2 Dickens, 712, 725, 726.
[6] 17 Ves. 152, 169.
[7] See Marvel *v.* Babbitt, 143 Mass. 226; Pierce v. Gould, 143 Mass. 234, 235; Mechanics' Savings Bank *v.* Waite, 150 Mass. 234, 235.

I made the decree appealed from in Foster *v.* Bailey, 157 Mass. 160, 162. The particular form which it took, allowing the defendant, the administrator of an administrator, to retain one share of stock and a savings-bank book as security for what might be found due to his intestate on the settlement of his account, and directing him to hand over the rest of the assets, was consented to, in case the defendant had a right to retain anything. I made the decree on the assumption that the change in the position of executor and administrator which I am considering left their rights undisturbed. Of course if the liability were only to account for a balance, the executor of an executor would not be bound to hand over anything more, and could not be compelled to pay anything until the balance was settled. His duty, when established, would not be

to deliver specific property, but to pay a sum of money. I do not know what evidence can be found on this point. It is fair to mention that the plea offered in 30 Ed. I. 240, by executors of executors, was that, "We held none of the goods of the deceased on the day when this bill was delivered." But that may be no more than a general form. "Bons" probably only meant property.

74. THE EXECUTOR IN ENGLAND AND ON THE CONTINENT [1]

By Robert Caillemer [2]

THE European systems of legislation present to-day many differences in the matter of testamentary executorship; yet during the Middle Ages this institution offered throughout Christian Europe nearly the same aspect. The point of departure has been one, though the paths have diverged widely. In Italy, France, Spain, England and Germany the testamentary executorship played during the Mediæval epoch a pretty uniform part; its legal structure reveals everywhere the same legal traits. Born of the same creeds, it assumed everywhere the same forms.

The part it has played is considerable. The testamentary executor has been the intermediary of numberless pious gifts; the cartularies of the convents are full of acts drawn up by executors for the good of the souls of the deceased. We

[1] This Essay consists of extracts from a treatise entitled "Origines et développement de l'exécution testamentaire; époque franque et moyen âge" (Lyon, Rey; 1901). In extracting the parts needed to give some continuity in the account of English law, some transposition was necessary. The pages of the original, at the beginning of the respective passages, are shown in a bracketed footnote; they are chiefly pp. 3, 682, 679, 95, 406, 453, 503. The author has revised and added to these passages for the purpose of this Collection.

The translation is by Mr. Ernst Freund, of the Editorial Committee.

[2] Professor of the History of French Law, in the University of Grenoble, France, since 1906. Graduate of the University of Lyon, Faculty of Law; *chargé de cours* in French legal history, at the same, 1901-1903; *agrégé* in legal history at the University of Aix-en-Provence, 1903-1906.

Other Publications: Administration et confiscation des successions par les pouvoirs publics au moyen âge, 1901; Le mercantilisme libéral à la fin du XVIIe siècle: les idées économiques et politiques de M. de Belesbat (with A. Schatz), 1907; and numerous articles in periodicals, chiefly on the history of family law and succession law.

cannot realize to-day the social importance of the functions of these almoners. It is due to them and to the bounty they are going to bestow upon the convent by the request of the deceased, that the body of the latter is allowed to receive an honorable burial in consecrated ground; due to them that the soul of the dead can be happy in the other world; for alms redeem sin. Happy he who has left behind him an almoner to watch over his soul, and make gifts *pro anima*.

This is not all. Beside the religious part, the testamentary executor played after the 12th century another which is essential in the law of succession. He is the liquidator of the estate of the deceased. He receives his assets, goods and demands; to him also pass the debts. To third parties he continues the person of the deceased, like the heir of the Roman law. He must settle and adjust the varied interests arising in connection with the succession; he interprets the will; he allays controversies; he delivers the bequests to the legatees, and if after the settlement of the estate, something is left over, he disposes of it in his discretion as he may judge most beneficial for the soul of the deceased. Often the testator has given only the briefest hints, relying upon the executor for the disposal of the surplus.

[1] By a remarkable coincidence, the institution developed at the same time and assumed a great importance in two other legal systems, the Byzantine and the Mahometan. The testamentary executorship which appears in its germs in the law of Justinian, grows in strength in the Byzantine law of the 9th and 10th centuries. The *ἐπίτροπος* resembles in many points the executor of the Western law: he too temporarily continues the person of the deceased, he too is placed under the close supervision of the public authorities, lay and religious, which can remove him and appoint in his stead an official administrator.

Perhaps under the influence of the Byzantine law, but with very original peculiarities, the testamentary executorship had also come to hold a place of great importance in the Mahometan system of succession. Of considerable consequence in the Shafite and Shiite laws, it attains its maxi-

[1] [P. 682.]

mum development in the Hanefite law. An authority of the 12th century of our era, the Hedaya, gives us precise and detailed information concerning it, and we are somewhat surprised to meet with rules mentioned by Beaumanoir, and with principles established by English custom.[1] Here too the executor appears as continuing temporarily the person of the deceased, as his active and passive representative. Moreover, in the Musulman law, as in the law of Southern France and of the German cities, the testamentary executor performs important functions in the guardianship of the minor children of the deceased. Finally like the Roman-German and the Byzantine law, so the law of Islam knows an *ex-officio* executor of testaments, the judge, who can name official administrators, in case the executors chosen by the testator do not perform their functions or happen to die.

The testamentary executorship thus played in the Middle Ages an essential part in the legal life of the civilized world. A complete history of testamentary executorship during the Middle Ages ought not merely to set forth the development of the institution in parts of the world apparently so dissimilar, but should also suggest the reasons which have given rise to it everywhere at the same time, and explain the striking resemblances which it presents under different conditions. Perhaps the cause of this parallel movement may be found in the universal spread of the idea of charity in the Frankish epoch and at the beginning of the Middle Ages, in the impulse then given to the relief of the poor, to pious gifts, and eleemosynary foundations. The world of Islam and the world of Christianity share in this movement. The Christian wants his goods distributed to the poor and to monasteries, the Musulman desires that his fortune may serve to organize pilgrimages to Mecca or establish philanthropic works. Both have taken upon themselves the duty of charity during life, and they do not want its accomplishment put an end to by their death. Their care is to find for the continuation of the task some person other than the

[1] Hedaya, LII, 7: the executor having accepted his office is definitely bound to perform the will; the rights of the deceased executor pass to his own executors.

heres institutus of the Roman law, a person who however like the heir will succeed to the rights and actions of the deceased, who will collect his goods and claims, to whom the estate of the deceased will not pass as to an heir or legatee, but who will deal with it as a master, so that it shall not become *res nullius*.

[1] There is no indication of such an institution in the customs from which the law of the Frankish period sprang. Neither in the Roman law of the lower Empire, nor in the usages which ruled the Teutonic nations, are there testamentary executors. But the study of these customs reveals certain elements, the combination of which contains the germ of the institution.

In the 8th century, the executorship is found everywhere on the continent, and from that time we can trace its history easily. In the first centuries of the Middle Ages, this history is independent of that of the testament. The latter is unknown in Germany, and in the greater portion of France has disappeared under the influence of Germanic ideas, which are hostile to acts *mortis causa*, and require for the transfer of rights public acts *inter vivos* showing a surrender of seisin on the part of the alienor. The testament proper, as an unilateral and revocable act, is found hardly anywhere except in Languedoc and Italy. Everywhere else the executor is appointed by an act of delivery: the grantor transfers by act *inter vivos* a specific portion of his property (usually land) to the executor (*eleemosynarius*, *wadiator*), charging him to transfer in his turn upon his death the property to some other person or to the Church.

In the 12th century, under the influence of different causes, especially of the revival of the Roman law, the testament reappears throughout Occidental Europe, and the old executorship gains entrance into this new institution. From now on the executor is appointed by a will, and carries out its dispositions. At the same time the Canon law develops a system of supervision by public authority over the carrying out of wills. This is the era in which the executorship attains its highest development. And it is precisely the time when

[1] [P. 679.]

the executorship, together with the will, makes its appearance and becomes organized in the English law.

In the last centuries of the Middle Ages, finally, the institution enters upon a crisis, due to the renascence of the Roman law and its influence upon the customs. The Romanists revive the *institutio heredis*, and since the 13th century, in Italy and in Southern France, the heir gradually resumes the first place in the testamentary succession. Every advance of the heirship marks a step backward of the executorship. The executor ceases to be a channel of devolution; he loses all title to the goods of the deceased; he becomes a simple supervisor of the heir.

In Northern France the crisis came with less rapidity and intensity. During the entire Middle Ages, the executor's seisin remained almost intact, exclusive of the seisin of the heir; the executor remains, down to the 16th century, the active and passive representative of the person of the deceased. True, since the 13th century the premonitions of decay are discernible in the possibility that the heir may under certain conditions exclude the executor from the seisin of the goods of the succession, in the increasing limitations upon the extent and duration of the executor's seisin, in the appearance of residuary legatees distinct from the executors. But only since the codification of the customary law, especially in the 17th and 18th centuries, does this decay become pronounced, owing to the progress of the universal (*legs universel*) and the attacks of the Romanists. In the Civil Code of 1804, the executor has no real power; he is no longer the representative of the deceased, and his rights do not materially limit the right or the seisin of the heirs.

In Germany, the same crisis occurred only after the reception of the Roman law; until that time the executor retains his entire autonomy. But, since the 16th century, the Romanists and writers of the German common law, in order to define the position of the executor, put forward various theories, all tending to narrow his functions: some consider him as a mere agent of the heir. The first draft of the German civil code confirmed this effacement, and it required the ef-

forts of the Germanic jurists to restore him to a portion of his ancient dignity.

In England the crisis came likewise, but it took another direction. It resulted in the aggrandizement of the powers of the executor: he assumes in the English law of succession a preponderance which the ends of the institution by no means required. In the 13th and 14th centuries the English executor had only limited powers and was the object of active supervision. In the 16th century he has become the almost uncontrolled master of the succession to the personalty, he pays himself in preference to other creditors, his debt to the deceased becomes extinguished, he retains the residue of the estate, the concurrent rights of widow and children of the testator to parts of the personal property have disappeared. The executor becomes like an appointed heir, or rather, in numerous points, he has more rights than an heir. Only in comparatively recent times has there been a reversion to a more appropriate measure of powers, and the most exorbitant of the powers, the right to retain the residue, has disappeared.

[1] As we have seen above, the history of testamentary executorship begins in England only with the 12th century. In the law of the Anglo Saxon period, the right to dispose by a last will had been a privilege reserved to certain preferred persons, in derogation of the common law. It had been necessary to surround this testament with special guaranties. Hence the nomination of a guardian (*mund*) of the will (*cwide*). The intervention of a great person in the execution of a will might, to be sure, have more special objects than mere general protection; it might for instance be a means of bringing about a testamentary disposition of Folkland, not specially granted by charter, and hence subject to the common law of Germanic custom excluding wills. But even where the will disposes of Bocland, the charter of which gives the owner the right to leave it by will to a successor of his own choice, the testator will endeavor to obtain for his will the consent and protection of the King, for which purpose we find in some documents a gift to the King of

[1] [P. 95.]

the heriot. The *mund* is very different from the testamentary executor as we shall find him later on in the English law, and if we want to find some analogous institution on the Continent, we must think, not of executors, but of the *adjutores* and the *defensores*, who in the charters of the Middle Ages, guarantee and protect legal acts.

After the Norman Conquest the *cwide* disappeared, and with it the *mund* charged with its protection. When subsequently the testament developed in England, it presented, like the continental testament, executors to carry out its provisions. In order to trace the development of the institution in the English law, we shall study the growth of the following three rules, which characterize the position of the testamentary executor in the common law, and which have appeared successively in the order named: first, the executor receives the chattels of the testator; second, he is the representative of the testator, both for claims and liabilities; third, he has a right to the residue.

[1] I. In England, during the Middle Ages, the seisin of the executors never embraced, as it did on the Continent, the entirety of the succession. One domain eluded them: that which was afterward called real property. The executors had their rights limited to personal property. At the very period when in England during the 12th century the testament developed, the English customs became strongly attached to the principle that no one can alien an immovable without entirely divesting himself of it during his lifetime, and they even required for the validity of gifts of immovables that the donor should be in sound bodily condition. This virtually amounted to a prohibition of testamentary disposition of immovables. Consequently the sphere of action of testamentary executors became restricted to movables.[2]

[1] [P. 406.]

[2] This restriction was not absolute. Certain species of property, such as houses in cities, were assimilated to chattels, and regarded as devisable; they could therefore pass under the seisin of the executor. Bracton (ed. Travers Twiss) VI, 24, says that these houses are *quasi catalla*. But the executor very soon loses their seisin. In the 15th century the legatees of these houses may take possession of them without requiring the assent of the executors; and even where the testament directs the executors to sell such property and to distribute the proceeds, the

On the other hand, the executor became exclusively entitled to chattels: excluded from real property, he in his turn excluded any share of the heir in the personal property. This produced a complete separation within the English law; real and personal property became two independent spheres of law. After the Norman Conquest, the English system of succession took for its foundation the strict application of the parentelic system, with primogeniture and preference of males. This system was inapplicable to movables; and thus, as to them, the testamentary executorship had a chance to develop itself.

It is certain that this system of devolution of personal property did not spring into existence ready made. On the contrary, we have positive evidence of the end of the 12th century to the effect that at first the *catalla*, like the immovables, passed to the heir; and that the heir, with the *catalla*, paid the debts and performed the last will. This fact is clearly indicated in 1176 in the assize of Northampton.[1] In the course of the 13th century, a modification took place. Gradually the heir ceased to meddle with the *catalla*, which became the exclusive domain of the executor. In 1215, the Petition of the Barons to King John, article 15, and the Great Charter, article 26, decide that the *catallum* of the deceased, shall be left to his executors, as soon as the debt due to the king, is paid, and we find the same rule in a great number of later texts, in the Great Charter of Henry III, article 18, in Bracton, and above all in the numerous documents of the rolls of Gascony relative to England from 1242 to 1254. The king commands his officers not to disturb the executors in the possession and administration of the *catalla*, and to cause to be restored to them such as may have been taken from them.[2]

seisin belongs, not to the executors but to the heirs at law. Littleton 167, 169. — On the other hand, the executors have always had the seisin of chattels real, rights in lands of fixed duration, and hence not included in the term real property: term of years, wardship in chivalry, and the right of mortgage, when it is created, not by a feoffment, but by a lease for years. *Vice versa*, heirlooms, though movable, go to the heir.

[1] § 4: "Si quis obierit francus-tenens, haeredes ipsius . . . catalla sua habeant, unde faciant divisam defuncti."

[2] Michel, Rôles gascons, I Nos. 109, 347, 367, 671, 1458, 1463, 1557, 1820, 2750, 3204, 3487.

The statement that the entire personal property sòon came to fall into the hands of the executor is liable to be questioned on the ground that numerous documents of the 13th and 14th centuries show that the testator cannot dispose freely of all his movables. If he leaves both wife and children, he may dispose only of a third; if only a wife, or only children, then of one half of the *catalla*.[1] Must we then not say that the executor is seised only of a third or one half of the movables, of the dead's part?

The documents which inform us concerning this tripartite division of the decedent's movables show at the same time that all movables are delivered to the executors. Thus in Bracton the two rules are stated side by side, and the rolls of Gascony always mention the delivery to the executors of all *bona* and *catalla*. These two rules, while apparently in conflict, are not so in reality. The personal property is handed over entirely to the executor; but he can perform the will of the deceased only with regard to the third or the half of the goods; he must return the other parts to the widow or children. So the Year Books show the widow and the children of the testator suing the executor to recover their parts. The doctrine of the *pars rationabilis* therefore does not limit the extent of the executor's seisin, but merely his power of disposition. Strange to say, this relation between the executor's seisin and the widow's and children's rights is not peculiar to England; we find it clearly in another country in which the tripartite division of the testator's goods has been developed, to wit, in Catalonia: the executors there are seised of the entirety of the movables, but have to give one third to the widow, one third to the children, and distribute the residue according to the will of the testator. Moreover, we shall see presently that this right of the widow and children to the chattels has gradually disappeared.

Thus, as early as the 13th century, the executors have become the successors of the testator for the chattels, just as the heir receives the real property. They are in fact

[1] As Brunner has shown (Zeitschrift der Savigny Stiftung, Germ. Abt. 1898, p. 107 seqq.), this division of the succession into two or three parts is a widespread institution in the customs of the middle ages.

temporary owners of the chattels. The legatees, for the time being have only an imperfect and inchoate right to the legacy, and their right becomes perfect only through the assent of the executor. As long as this assent has not been given, the executor is sole master of the chattels; he alone can validly dispose of them. While many customs of the Continent limit the executor's seisin to one year, the English common law provides, on the contrary, that during the first year the legatees cannot sue the executor to compel him to deliver the chattels.

This right of the executor to the chattels springs directly from the testament. It does not seem that the English law ever required a *traditio inter vivos* of the *catalla*, and the instances that can be adduced of such a delivery *inter vivos* are very rare. As early as the year 1100, the charter of Henry I (article 7) admits that simple words spoken on the deathbed can have the effect of passing the *pecunia*; a will without delivery may therefore give to the executors a right to the movables.[1]

The right of the executor, like every other right to personal property, is transmissible to his own representatives, to his executors.[2] The requirement of words of inheritance to make property descendible to the successors of the donee, applies to real property only. However, when there are several executors, and one of them dies, his right passes, not to his own representatives, but to the other executors. This is no exception to the principle of transmissibility, but simply means, that, the executors being joint tenants, the rules of joint tenancy are applied to them; the survivor takes all the rights of the predeceased, and transmits them

[1] It might happen that the testator wanted to confer upon his executors a right to his immovables: for this purpose, a transfer *inter vivos* was required, a feoffment of the immovables to the executors; and we have here one of the oldest and most remarkable application of uses, strongly reminding of the old form of executorship on the Continent (See Holmes, vol. II., of these Essays, No. 41). But these are in our opinion very different things. From the 13th Century on, the English law separates sharply the feoffee to uses, whose right relates to real property and arises from a feoffment, from the executor, whose right relates to personal property and arises from a will, the two capacities remain distinct, even while united in the same person.

[2] St. 25 Ed. III c. 5.

to his own representatives. From this results a chain of representation, a chain of executorship, which closes only when the last executor dies intestate.[1]

[2] II. The representation of the deceased by the executor developed in England later than on the Continent. Only since the 12th century is the testamentary executorship known to the English customs, only from the 13th century on did the representation of the testator by his executors gradually establish itself. Certain obstacles stood in the way of the transfer of the claims and debts of the deceased to the executor.

In the first place, any assignment of a claim by the testator to the executor was almost impracticable. Obligations to the bearer, the use of which had in Italy rendered the transfer of claims from the testator to the executor possible, were almost unknown in England at the beginning of the 13th Century.[3] Again, representation in court by an attorney is admitted, at the same period, in exceptional cases only.[4] In Glanvil's time, it is permitted, on principle, only in the Curia Regis; outside of that, the person who desires himself to be represented must produce a royal writ stating that the *attornatio* took place *coram rege vel justitiis suis*. Moreover the *attornatio*, where it is permitted, is terminated by the death of the person represented. Hence it was impossible to make the English executor either an assignee of a claim or an attorney.

Moreover, after the English law, in consequence of a concession which will be traced presently, has permitted the claims of the deceased to pass to the executor, it emphasizes in a striking manner the difference between a testamentary executor and an attorney. When the testator in his lifetime appoints an attorney, the attorney's powers are revoked by the death of the principal, and in order that the attorney may after the death of the principal retain the benefit of

[1] Blackstone II c. 25, 32. Cf. Littleton 280, 281. The administrator of an executor dying intestate does not succeed to his office.

[2] [P. 453.]

[3] [See Essay No. 50, in this Volume, "The Early History of Negotiable Instruments." — Eds.]

[4] [See Professor Brunner's article, "The Early History of the Attorney in English Law," Illinois Law Review, 1908, III, 257. — Eds.]

the assignments and prosecute the debtor, he must apply to the executors, to whom the law has transferred the claim.

As for the payment of his debts, the testator may undoubtedly charge his executor therewith, but we know how imperfect this arrangement is, since it does not exclude the personal liability of the heir. At the end of the 12th century, it is still the heir who succeeds alone to the claims and debts of the testator, just as he receives the *catalla*. Such is the law as laid down by the *Dialogus de Scaccario* (II, 18), about 1177—1179, and, ten years later, by the treatise attributed to Glanvil (VII, 5).

A rapid development altered this condition completely. Since the debts become a charge on the chattels, and the entirety of the chattels must be handed over to the executors, why not give to the executors directly the duty of paying the debts? Why not, on the other hand, concede to them directly the recovery of claims, since the amount recovered will come to them ultimately? The active and passive representation of the deceased by the executor was thus the necessary consequence of his having become the sole successor to the *catalla* of the deceased. But this representation did not come about all at once: admitted by the ecclesiastical courts at first to a limited degree, then somewhat more liberally, it was finally, at the end of the 13th century, fully established by the royal justices.

Bracton's Notebook reveals to us the first stage of this evolution.

On principle, the payment of the debts still devolves upon the heir, and the creditors of the deceased sue him in the lay courts (n° 1543, 1693). But as early as 1219 an heir demands a continuance in order to ascertain whether the deceased has not in his will mentioned the debt sued for; for in that event it ought to be paid, not by him, the heir, but by the executors (n° 52). Again, in 1222, the executors are sued in a court christian, and the action against them encounters a writ of prohibition, because the debt is not mentioned in the will (n° 162). It appears from these two decisions that debts named in the will are payable by the executors and not by the heirs.

As for the recovery of claims, it is again the heir who on principle represents the deceased. Twice, in 1231 and 1233, executors bring suit in the ecclesiastical court against the debtors of the deceased, and both times they are met by a writ of prohibition (n° 550, 810). But this prohibition relies no longer upon an absolute intransmissibility of the claims to the executor; this intransmissibility is only relative. The executors are barred from their action, because the claim has not been judicially established or acknowledged during the testator's lifetime, and therefore was incapable of being bequeathed. This view is confirmed by a note to a judgment of 1231. "*Nota quod in extremis non potest quis legare actiones suas, et maxime de debitis que petita non fuerunt nec recognita in vita debitoris.*" Bracton thus seems to concede that the claim of the deceased might be transmitted to his executors, if it had been acknowledged during the lifetime of the testator, and he gives as a reason that the claim so acknowledged constitutes part of the goods of the testator and is transmitted with them.[1] In fact the Notebook shows on two occasions executors recovering, without any question being raised, claims of the deceased. So, in 1231, we find testamentary executors vested with a claim secured by a mortgage, and granting to third parties some rights in the land thus pledged.[2]

Bracton, embodying in his treatise (written between 1250 and 1258) the decisions referred to in his Notebook, as yet

[1] Bracton, De legibus, ed. Travers Twiss VI p. 212; and Cases No. 162, 325, 550, 684, in his Notebook. This distinction between claims which have been the subject of judgment or acknowledgment, and others, is not peculiar to the English law. It is also found on the Continent; but it is noteworthy, that the English law which in principle has rejected without distinction any assignment of claims, admits the distinction in question only in the matter of testamentary executorship. This can be explained only on the theory that English custom regards the executor not as an assignee, but as the representative of the deceased.

[2] Bracton's Notebook No. 381, 559. The mortgage here seems to pass like a chattel into the hands of the executors; which is surprising, since at this time the creditor is ordinarily a feoffee of the mortgaged land, whose estate, upon his death, passes to his heir. Only in equity, the heir is regarded as trustee for the executor or administrator of the mortgagee: Williams, Real Property, 512. Perhaps this is the case of a mortgage created by a term of years, for the term of years is a chattel which passes to the executors or administrators of the termor.

considers the heir as the true representative of the deceased.[1] Yet we must ask whether at that time the development has not considerably advanced beyond that stage. The rolls of Gascony of 1242 and 1252 seem to regard the testamentary executors as the active and passive representative of the testator. True, in a compromise between the King and one of his debtors (No. 347, 367), it is agreed, that the heirs of the debtor shall pay his debt, and that the executors shall dispose of his goods; but we have here a covenant, a specialty binding the heir, which later on becomes necessary in order to hold the heir for the debts of the deceased. In all the other cases, action for the debt of the deceased is brought against the executors (77, 457, 1386). Moreover the executors bind themselves to pay to the King the debts of the testator that might hereafter be discovered (1820, 2750, 3487, 3534); their responsibility is thus no longer limited to the debts mentioned in the will and acknowledged by the deceased. On the other hand the King directs his bailiff to pay to the executors, and not to the heirs, the sums which he owes to the testator (1672, 3114, 3137).

The wills of the same period show that the clause binding the testamentary executors to pay all the debts of the deceased has become a common form. It is found regularly in the wills registered since 1259 in the Hustings Court of London, and it is generally accompanied by particular directions as to the goods chargeable with the payment of debts.[2] On the other hand, in 1248, an Archdeacon of York, by his will, places at the disposal of his executors "*omnia sua, tam debita, quam ubique locorum inventa sint;*" which implies a transfer, without distinction, of all claims of the deceased in favor of the executor.[3]

These illustrations show that as early as the middle of the 13th century, the executor was according to the English

[1] Ed. Travers Twiss I p. 482; II 122; 220; VI p. 212.

[2] Sharpe, Calendar of Wills I, pp. 3, 4, 11, 12, 13; Rymer, Foedera I, p. 495, will of Edward, son of the King of England (1272): "as queus (i.e. the executors) nus donoms e grauntoms plener poer, ke ils pusint ordiner, pur nostre alme, de tuz nos beyns moebles e noun moebles, cum en rendre nos dettes e redrecher les tort ke nus avons fet par nus ou par nos Baliz."

[3] Historians of York III p. 165 (1248).

view the true successor to the claims and debts of the deceased; and the English common law would have adopted this solution very quickly, had not the question of principle been complicated by a conflict of jurisdictions.

It was through their connection with the will, as testamentary causes, that the "actions of debt" by or against the executors had been allowed by the courts christian;[1] but this method of procedure threatened to derange and alter the theory of contracts. The courts of the church, under pretence of restraining every breach of promise (*fidei laesio*), indirectly came to validate obligations that were not binding in the eyes of the lay courts. Moreover, they proved to be much less strict than the lay courts about the proof of obligations; and so the death of the debtor or creditor, by changing the jurisdictions admissible for the action of debt, had its effect upon the contracts themselves.

This is the reason why the lay justices were led to contend against the justices of the Church, with a view to retain or recover, not a general jurisdiction in matters testamentary, but a special jurisdiction in the matter of actions of debt by or against the executors. In order to prevail over the ecclesiastical courts on this point, the lay courts in their turn consented to treat the executor as the active and passive representative of the deceased.

A rapid development transferred from the courts of the Church to the lay courts the actions of debt to which testamentary executors were parties. A register of writs of the first years of Edward I shows that there are some who allow to the executor a *breve de compoto reddendo*, and that this action, being testamentary, belongs to the church. But some time afterward, between 1279 and 1285, the *Articuli cleri* show the English clergy complaining of the prohibitions encountered in the actions brought against the debtors of the deceased by testamentary executors in the ecclesiastical courts. The advisers of the King answer that the executor must not occupy, as against the debtors of the estate, a better position than the testator himself; in the courts of the church, the executor might prove the debt "*per duos testes*

[1] See above, on this matter, vol. II, p. 301.

minus idoneos," while the defendant could not defend by the oath and the other methods of defence admitted by the temporal courts, and would thus find his position impaired by the death of his creditor.[1]

It is certain that even before 1285 the temporal courts assumed cognizance of actions of debt brought by or against executors; for at that date the Statute of Westminster Second gives executors in the temporal courts the *breve de compoto reddendo* (13 Ed. I, c. 23); at the same time, it requires the ecclesiastical Ordinary, successor to the goods of an intestate, to pay the debts of the deceased "in the same manner as testamentary executors (c. 19)." Thus the executor becomes in the temporal courts the active and passive representative of the deceased. No doubt, in 1287, the synod of Exeter (c. 50) excommunicates debtors of the estate who prevent testamentary executors from prosecuting their claims before the courts of the Church. But these protests are of no avail. About 1290, while Fleta, under Bracton's influence, seems wavering,[2] Britton is quite positive: though testamentary causes belong to the courts of the Church, nevertheless the actions of debt belong to the temporal courts exclusively.[3] From about the same time, the Year Books[4] and the Rolls of Parliament[5] leave no further doubt. The debts and claims devolve upon the executor; and the actions to which they give rise belong to the temporal courts.

Thus the English temporal jurisdictions, following the example of the courts christian, established the active and passive representation of the testator by his executors. The heir is no longer held for the debts of the ancestor, unless the latter has covenanted for himself and his heir, later on called a specialty binding the heir.[6]

[1] Raine, Historical papers and letters from the Northern registers, No. 43, p. 71 (1279-1285), § 3.

[2] II 57, § 13 seqq.; II 62, § 8 seqq.

[3] Britton c. 29, § 35.

[4] Y. B. 20 and 21 Ed. I, p. 375 (1293); 21 and 22 Ed. I, p. 259 (1293), p. 519 (1294), p. 599 (1294); 33 and 35 Ed. I, p. 63, 69 (1305); 30 and 31 Ed. I, p. 238 (1302).

[5] Rolls of Parliament I, 43, 47a, 107, 164, 197 s.

[6] Already the Fleta clearly indicates this principle: Fleta II 62, § 10. But see Stat. Westm. I. c. 36; Stat. Westm. II. c. 35, which admit subsidiarily an action against the heir, *si executores non sufficiant*.

We must not however exaggerate the practical importance of the development thus far traced. The actions which are transmitted from the debtor or creditor are not yet numerous. It was in connection with the action of debt, that in the course of the 13th century the struggle was fought out, first between the heirs and executors, then between courts christian and courts temporal. The *breve de compoto reddendo*, which the courts christian had endeavored to secure to the executors, was given them by the lay courts after 1285. But the actions founded on injury to the person or property of the testator or on injury done by him remained absolutely intransmissible. The English law applied rigorously the rule: *actio personalis moritur cum persona.* A series of reforms, leaving the principle intact, restricted the scope of its application. The first step in that direction affected the executor's active representation, and was taken in 1330 by the famous statute of Edward III "*de bonis asportatis in vita testatoris*," which gave to the executors the action of trespass that had accrued to the testator by reason of damage done to his personal property (*bona et catalla;* 4 Ed. III, c. 7). This statute was later on interpreted most liberally; but it extended neither to injuries done to the person of the testator, nor to damage done to his real property. On the other hand, as regards the executor's passive representation, actions founded in tort became extinguished (according to the doctrine of the Middle Ages) with the death of the wrong doer; it was only conceded that the executor might be held for the benefit (in money or goods) received by the wrong doer. Only in the 19th century was an action given against the testamentary executors for the damage done by the testator within six months prior to his death, to the property (real or personal) of a third person; and on the other hand, an action on behalf of the executors for damage done to the real property of the testator within six months prior to his death. As regards actions founded on personal injuries, they have remained practically intransmissible, both in favor of and against executors. Even in contractual matters, the transmission of claims and debts to the executors had not in the 13th century the importance which it subsequently as-

sumed; for it must be remembered that in the English law the system of contracts at the end of the 13th century was very imperfectly developed.

Thus the English law gradually came to make the executor the active and passive representative of the testator. Claims and debts of the deceased devolve on him, as they did on the heir in Rome, — a resemblance noticed by English writers.[1]

But what happens, if the debtor of the deceased or the creditor of the deceased is the executor himself? What will result from the concurrence in the same person of the two capacities of creditor and debtor? The English common law has not hesitated to accept the extreme consequence involved in the idea of representation: the claim of the executor against the deceased, his debt to the decēased, becomes extinct by merger. The English writers while not using the word, state the fact. If the testator appoints his debtor as executor, he thereby releases the debt. For a claim, the English writers say, is nothing but a right to recover a sum of money by action. Since the executor cannot sue himself, the appointment of a debtor to the office of testamentary executor of his creditor suspends the right of action arising from the claim. But when an action is suspended voluntarily by the person who might have brought it, it is regarded as permanently extinguished. If the testator appoints his creditor as executor, the doctrine of the common law is more complex: as soon as the executor gets possession of the assets of the estate, his claim becomes extinct; and if there are co-debtors, the creditor can no longer sue them. But the English law gives to the executor a right of retainer; he may pay himself out of the assets, in preference to other creditors of the same rank.

Such is the doctrine of the common law. When was it introduced? We cannot tell. English custom has conferred upon the executor exorbitant rights, without it being possible to follow the stages of the evolution.

[1] Doctor and Student, I, c. 19: "the heir, who in the English law is called executor."

[1] III. The bestowal of the residue upon the executor has likewise assumed in the English law a much more pronounced character than that given to it by the customs of the Continent. On the one hand, while on the Continent a formal clause of the will is required in order that the residue may belong to the executor, at common law the residue of the *catalla* belongs to him as of right. On the other hand, while in the continental customs the residue is handed to the executor merely for the purpose of distribution, at common law, the residue belongs to him, and he retains it for himself.

This is one of the best established rules of the common law; yet its origin is obscure. The English wills of the 13th century rarely contain a residuary disposition; as a rule they are made up of a number of particular bequests. What, then, becomes of the residue? In the silence of the authorities, a positive reply is impossible. Yet the thought occurs that the same reasons that have kept the heir of the real property from any administration of the *catalla* must also have rendered difficult any claim of the heir concerning the residue. The heir of the real property must have very rapidly lost all relation to the *catalla*, from the point of view of the residue as well as from any other.

It is true that wife and children have a right to a part of the *catalla*; but just because this part is fixed by custom, it is difficult for them to raise claims to the "dead's part," i. e. the residue, and it is very probable that this part, even in the absence of a formal clause in the will, was expected to be applied entirely for the good of the soul of the deceased.

It is also possible that the rules relating to the assignment of the "dead's part" to the executors have been influenced by rules relating to its assignment to the administrators (who also, at that time, were called executors). The administrator may dispose of the dead's part of the deceased: why should the executor, chosen by the deceased and enjoying his confidence, not have the same right? As soon as the executor has distributed the legacies expressly given by the deceased, he finds himself, as to the residue of the "dead's part," in the same position as the administrator. We there-

[1] [P. 503.]

fore believe that in the 13th or 14th century (beginning at a time which it is impossible to fix now) the executor had the power, in the absence of any testamentary clause, to distribute for the benefit of the soul of the deceased the residue of the "dead's part," without having to restore it to the heirs of the deceased.

But we are here as yet far from the final result reached by the common law, for: 1. The executors cannot dispose of the residue of all the *catalla*, but only of the residue of the "dead's part." 2. They may not keep that residue for themselves, but must distribute it for the benefit of the soul of the deceased.

And first, as we have seen above, the testator cannot dispose freely of all his chattels. If he leaves a wife and children, he can dispose only of one third; if he leaves a wife or children, he can dispose only of one half. Hence the executor's right can extend only to the residue of the third or half, the "dead's part." The other parts he must restore to the widow and children. But the rights of the widow and children have gradually disappeared from English custom, without it being possible to say at what time the transformation took place. As early as the 16th century the division of the *catalla* into two or three parts ceased to exist in a great portion of England, while it survived until the 17th century in London, Yorkshire, and Wales: only at the end of the 17th and the beginning of the 18th century several statutes brought uniformity to the English law on this point.

Moreover, even with the limitation mentioned, the residue was not absolutely free in the hands of the executor; he was not allowed to keep it for himself. He had to distribute it for the benefit of the soul of the testator. His large powers over the residue were like those of an executor in the continental law to whom a formal clause has given the right to distribute the residue; he was a distributor, and not a beneficiary. This resulted at first from the very nature of the "dead's part," the third or half reserved to the deceased. The division of the succession did not contemplate the enrichment of the executors, but the benefit of the soul of the deceased, and that third part, in the absence of a contrary

clause, must be devoted to pious works. This appears from numerous wills of the 13th century; whenever these instruments speak of the residue, it is to charge the executors to distribute it.[1] The same is still true in the 14th Century: the executors receive the residue to distribute, not to keep it; they must distribute it "*in periculo animarum suarum*"; and they will answer for it before God "*in tremendo judicio*."[2] At this time also, the English councils and synods prohibit the executor from keeping, on whatever pretence, the goods of the succession. The synod of Worcester (1240), c. 49, the council of Lambeth (1261), the synod of Exeter (1287), c. 50, and the council of London (1342), c. 7, declare that the executor has no right to retain any part of the goods of the deceased, save as creditor or legatee. At most the bishop is permitted, when the succession is considerable, to allow the executor a small remuneration *pro ipsius labore*.

We find, however, in the 14th century, in several wills which increase in number as we approach the end of the century, legacies of the residue by which the testator transmits this residue, not to be distributed, but to definite beneficiaries. One fact is to be noticed: while in France these dispositions were made for the benefit of third parties other than the executors, in England, in the great majority of cases they are made to the executors themselves, or to some of them. By virtue of such clauses the executors take the residue, not to distribute but to keep it.[3] Moreover in some instruments the legacy of the residue is expressly given to the executor as such, and the testator takes care to declare formally that if the executor, who is also residuary legatee, will not take upon himself the execution of the will, he shall not be allowed

[1] Bracton's Notebook, No. 550 (1231); Historians of York, III p. 165 (1248); Madox, Formulare No. 771 (1295); Sharpe, Calendar of Wills, p. 1, 3, 5, 48.

[2] Wills and Inventories, I No. 16 (1313), No. 25 (1335), No. 29 (1372); No. 31 (1378); No. 33 (1388); Madox, Formulare No. 774; Testamenta Eboracensia, I No. 1 (1316), No. 5 (1342), No. 70 (1375), No. 142 (1393); Historians of York III p. 271 (1349).

[3] Madox, Formulare, No. 773 (1326); Wills and Inventories, I, No. 21 (1334); No. 26; No. 30 (1372); Testamenta Eboracensia, I No. 3 (1341); No. 4 (1342); No. 6 (1342); No. 7 (1344); No. 13 (1346); No. 144 (1392); No. 8; No. 12.

to claim his legacy. So in 1395 a widow has appointed her son as "chief executor" and has bequeathed to him the residue of her goods; but she adds that if her son should refuse execution, the residue shall be distributed among the other executors.[1]

As these instruments prove, the English custom, at the end of the 14th century tended to regard the two capacities of testamentary executor and of residuary legatee as tied up with each other. At what moment did this usage become a rule of law? We cannot say. We can only state the point of departure of this development, and its final outcome.

This final outcome is clear. If the deceased has not named in his will a residuary legatee, then according to the common law the executors must collect the residue of the personal property, and they may apply it to their own use. Their position is in this respect exactly like that of the Roman heir, whose right may be limited in fact by particular legacies, but who has a contingent claim to the entirety of the succession. In English law, all disposable goods not charged by the testator with a fixed application go to the executor and belong to him as his own. This rule is clearly formulated by Blackstone: "If there be none (residuary legatee)," he says, "it was a long settled notion that it developed to the executor's own use, by virtue of his executorship,"[2] and in Blackstone's time this rule is set aside in equity only when it conflicts with the clear intention of the testator, as *e. g.* where the testator has given the executor a fixed legacy.

It may even happen that the executor receives not merely the residue, but all the chattels. In England, as on the Continent, in the Middle Ages, a custom grew up for those who, surprised by death, had not the time to regulate in detail the disposition of their goods, to name simply a distributor, a *commissarius*, leaving it to him to distribute at his discretion the goods of the decedent. This practice, quite opposed to the principles of the Roman law, is found everywhere in the 13th century. In 1216 King John, attacked by a sudden illness, entrusts the *ordinatio* and *dispositio* of his property

[1] Furnivall, Fifty Earliest English Wills, p. 4, p. 9.
[2] II, p. 514.

to thirteen faithful friends, leaving to them the care of distribution. In vain did Innocent IV, about 1246, declare such testaments void, and wanted to treat those, who were content to name an *expressor et executor*, as intestate. The Fleta and Britton declare that one may leave "simplement sauntz aucune especialté . . . sa dreyne volunté en la distribucioun de touz ses biens moebles en la ordinounce de acun ami." So the mere appointment of an executor is enough to constitute a will.[1]

These executors, appointed without any directions, were, in the 13th century, certainly required to distribute the chattels, at least the dead's part, for the profit of the soul of the deceased. But gradually they are allowed to retain the dead's part, then the entire personal property, and thus the mere appointment of an executor has become in the common law the equivalent of a bequest of all the personal property for the benefit of the executor.

Not until 1830 is it provided by statute that the executors shall be regarded by the courts of equity as trustees for the benefit of the persons named in the statute of distributions as takers in case of intestate administration, namely, the next of kin. Only in our days therefore has the English law come back to the rule which never ceased to be observed on the Continent: the residue belongs to the executor only if expressly so provided by the testator. The Scotch law, as early as the 17th Century, had done away with the extraordinary common law power of disposal, by putting again into force the tripartite division of the chattels and by limiting to the "dead's part" the right of the executor to keep the residue.

But it is not our task to trace through modern times the history of testamentary executorship. We have even omitted in this study many features of the institution in the Middle Ages. We have said nothing of the essential duties of the executor on entering upon his office (burial of the deceased, probate of the will, inventory); nor of the rules established by the English councils with regard to the supervision and control of the executors by the public authorities; nor of

[1] Rymer, Foedera I p. 144; Matth. Paris; Chron. maj. IV p. 604 et s.; Fleta II, 62, 13; Britton c. 29, § 35.

the creation of judicially appointed executors, the administrators *cum testamento annexo*. We merely wished to sketch the fundamental features which the institution presents on the common law, and to trace their development. We wished at the same time to indicate the importance of the executorship in the English law. It is there, what the *institutio heredis* is in Rome, *caput atque fundamentum totius testamenti*. In the 17th century, Swinburne and Godolphin declare that "the naming or appointment of an executor is said to be the foundation, the substance, the head, and is indeed the true formal cause of the testament, without which a will is no proper testament," but only a codicil. There are even some decrees that say that, without an executor, a will is "null and void."

Certainly, the evolution of the institution is not closed. The Land Transfer Act of 1897 has given the executor a new function in committing to him not merely the personalty but the realty, in making of him a representative of the deceased for the entire succession. The future, which alone can tell what the consequences of such a reform will be, may perhaps yet give a new lease of life to the old mediæval institution, which, when it declined on the continent, retained such vitality in the English law.

75. THE RISE OF THE ENGLISH WILL[1]

By Melville Madison Bigelow[2]

AS the first step to any stable theory of the post-mortem disposition of property, whether by testacy or by intestacy, it must be observed that the idea of absolute property forever in any particular owner, as in the case of an estate to a man and his heirs forever, is a fiction, — a useful fiction probably, but still a fiction. A grant to a man and his heirs forever is a grant to each grantee forever; the "heirs" have nothing in the estate granted. The grant therefore is to the grantee as if he might live forever, which manifestly is impossible, so far as this present life is concerned; and it is certain that no man can take his property with him after death. There can be no such thing then as absolute property forever, in the true sense of the term.

It is no answer to say that a man may be considered to live in his posterity, or even, to put the case still stronger, that a man holds posterity in his loins; for either form of statement is as much a fiction as the one first mentioned. The childless man is conclusive of the point. Nor is it an answer to say that the owner of property may sell or exchange it

[1] This Essay was first published in the Harvard Law Review, 1897, vol. XI, pp. 69-79, under the title "The Theory of Post-Mortem Disposition; The Rise of the English Will," and subsequently formed part of a treatise on Wills.

[2] Professor of law and dean of the faculty of law in Boston University Law School. Harvard University, Ph. D. 1879; Northwestern University, LL. D., 1896.

Other Publications: Placita Anglo-Normannica, 1879; History of Procedure in England (Norman Period), 1880; Leading Cases on Torts, 1st ed. 1875, 2d ed. 1895; Elements of Torts, 1st ed. 1878, 8th ed. 1907; Law of Estoppel, 1st ed. 1872, 5th ed. 1890; Law of Fraud, 1st ed. 1877, 2d ed. 1888; Overruled Cases, 1st ed. 1873, Supplement, 1887; Cases on the Law of Bills, Notes, and Cheques, 3d ed. 1894; Law of Wills, 1896.

for things consumable (if it be not consumable itself), and then consume the substitute; for in the case in hand the property, whether consumable or not, has not been consumed. Though it or some substitute might have been used up, as a matter of fact it has been left, and it is now to be disposed of at death. The answer supposed confuses the notion of "absolute" property, or one's *power* over things, with the duration of such power. As a mere matter of power, a man may certainly own property "absolutely."

Considered, however, as a theory, as it must be, how is the theory of ownership forever to be worked out? With cases of testacy there would be no difficulty; the testator is dealing with his own, and acting in person. In cases of intestacy the theory can only be worked out upon the idea of an implied agency in the State; the State acting for the owner in case of his failure to dispose of the property. But it is plain that such an agency can only stand upon a footing wholly unique and unlike any other. In the first place the supposed agency would be confined, as a matter of fact at least, to giving; it would not extend to selling or otherwise contracting. In the second place the supposed agency would go into operation where recognized agency ends, with the death of the principal. And in the third place the agency would be irrevocable. Agency cannot be stretched to such a point. And the same will be found true of any other term that may be used to do duty for the idea of acting for one who is defunct.

On what support then can a stable theory of post-mortem disposition be placed? Discordant answers have been suggested.

One answer is, that the title to property, subject to life ownership in a grantee, is in the State, and, but for the fact that the State has thought best to allow such grantee to designate the course of the property after his death, it would always revert to the State upon the death of the grantee. This view of the case, it may be noticed, has nothing to do with original ownership in the State, except inferentially; it proceeds upon the notion that the State has some sort of reversionary right upon the death of its grantee in fee and

of each of his successors in ownership, because in the nature of things no man can hold property forever. The theory of perpetual ownership collapses the moment it is put to the test, according to this view. I hold to myself and my heirs forever, the grant declares; but after my death the property becomes the State's, though the State allows me, by some sort of agency, to dispose of it. That fact, however, has no bearing upon the soundness of the theory of State ownership.

What then are the facts upon which this last named theory rests or derives support? And how does the theory work out its result? These questions in order.

Intestate laws strike one first. The State regulates the disposition of property at the death of the owner if the owner fails to dispose of it. And it may be noticed that the owner may so fail, not merely by making no attempt, but by making an attempt that does not conform to law. How, it might be urged, can the State interfere in such a way except upon the footing of ownership? The act of disposition is an act of dominion. If the State does not become owner at the time of the State's action, then the State cannot give the property, except by an exercise of arbitrary power, which means robbery. Again, if the State does not acquire ownership at the death of the grantee, who does? Not ordinarily the next of kin, in the case of personalty; in most cases[1] the State hands the property over to the executor or administrator. Not the heir, it might be said, even in the case of realty; the State hands the property over to him.[2] The State so hands the property over even against specific legatees or devisees, though there is no reason in the nature of things why the legatees or devisees might not take directly subject to the claims of creditors.

[1] Where, in the absence of debts against the estate, the property is found, after the late owner's death, in the hands of one who would be entitled to it, one need not take out letters of administration in order to acquire title. That is probably the effect of English statutes.

[2] The State, however, hands the property over to the executor, administrator, or heir as representing the deceased; hence the State cannot be said to act as owner in the transaction except in so far as interfering may be considered an act of dominion, and so of ownership; with which point compare the law of trover. The suggestion as to the heir is of course pure assumption.

Another fact which may be deemed to support the idea of State ownership is connected with what is called title by occupancy. The taking of really vacant property would seem to give to the taker ownership by natural right. But we are told that "this right of occupancy, so far as it concerns real property . . . hath been confined by the laws of England within a very narrow compass."[1] It seems to have been allowed, in real property, even at the first in but a single case, namely, in an estate for the life of another ("pur autre vie"), the tenant dying during the lifetime of that other person ("cestui que vie"). In such an event any one might enter upon the land and hold it during the unexpired period of the estate, that is, until the death of "cestui que vie." But this right was reduced almost to nothing in the seventeenth century by statute. That is, according to the view of State ownership, the State acted upon the principle or belief that the ownership had never been vacant; the entry of the new occupant was by mere permission, which the State now withdrew.

A more particular case, looking it may be thought towards State ownership, may be brought forward. Statutes exist touching any right of adopted children to inherit property of their parents by blood. Whether such children can so inherit is determined by statute; the State, it may accordingly be supposed, gives or withholds. To the suggestion that adopted children have no "natural" right to the property of a deceased parent by blood, the answer has been given from the bench that the suggestion is idle "for the reason that the statutory right is perfect and complete"; heirship being "not a natural, but a statutory right." Hence the State may increase the number of a man's heirs and cut down the shares of the others accordingly.[2]

These are a few out of many like instances that might be mentioned; but all may be comprehended in the statement that both intestate and testate disposition of property is a matter of statute; in other words, of regulation by the State. The State, it may therefore be thought, must be

[1] Blackstone, II. 257.
[2] Wagner *v.* Wagner, 50 Iowa, 532; Abbott's Cases, p. 123.

the owner; and besides, the State lives or may live forever, or at any rate it is expected to outlive the life of individuals, and therefore fulfils by possibility the requisite duration. And the State's grantee and his successors have permission or appointment, so the argument would run, to act instead of or for the State in disposing of property to pass at their death. We have, then, according to this theory, State ownership, with agency in the holder as a supplementary theory by which disposition post-mortem is worked out. Can this doctrine be put aside?

The question may be answered indirectly in the course of propounding another, and what appears to be the true, theory of law; which may be put thus: In the case of intestacy the State acts as an intermediary, in behalf of the public welfare. If no provision for the disposition of the property were made, the property at the death of the owner would become vacant, and a scramble would be apt to follow, the result of which would be as likely to be undesirable as the contrary. To prevent the property becoming vacant, the intestate, accepting a virtual offer by the State to act upon certain established terms, to wit, the intestacy statutes, — for in effect these are only an offer, — commits or leaves the property to the State, to distribute it upon those terms.[1] In this view the intestate has a well founded belief that the disposition which the State proposes is just and may save

[1] "Occupancy," says Blackstone, II. 257, "is the taking possession of those things which before belonged to nobody. This . . . is the true ground . . . of all property. . . . But when once it was agreed that everything capable of ownership should have an owner, natural reason suggested that he who could first declare his intention of appropriating anything to his own use, and . . . actually took it into possession, should thereby gain the absolute property of it; . . . quod nullius est, id ratione naturali occupanti conceditur."

Speaking of estates pur autre vie, Fry, J. says that when such an estate "is given to a man, or to him or his heirs, the most he can take is an estate for his own life, and any one who comes in after him takes, not through him, but as occupant of the estate. Originally, any one who pleased was allowed to scramble for the occupancy after the death of the first taker, but this was found to be so inconvenient that he was allowed to appoint by will a special occupant. But still every one who came in after the first taker came in as an occupant, and not as deriving title through him." In re Barber, 18 Ch. D. 624, 627.

This fairly represents the state of things which the laws in general concerning postmortem disposition of property are intended to prevent.

trouble, and possibly embarrassment and failure; and experience shows that in point of fact this is true in most cases, where attention has been called to the matter at all.

In the case of testacy it would seem at first that a theory actually prevails that the testator, in disposing of property owned by him absolutely, is disposing of his own, as much as when he gives or sells to take effect in his lifetime. But looking below the surface, this may after all be considered as merely concealing a distinction between ownership and title. The idea of testate disposition, when closely examined, appears to be no more than this, that, whatever may be true of ownership in the sense of holding and enjoying, a person's *title* may run on after the death of the person having it, wherever the grant or devise is to him and his heirs. Title accordingly means authority to dispose of; in that sense, obviously title may be served from ownership, and indeed have no connection with it.

It may be objected that this is using the word title in a sense out of the ordinary, and making it do duty for an idea foreign to it. But that is not true, as appears from the legal phrase "right and title to convey"; at any rate, the word is easily capable of the meaning given to it; and when understood accordingly, it is consistent with the fact that ownership, in the sense of having and controlling in the name of ownership, comes to an end with the owner's death, even though he holds "to himself and his heirs forever."

That fact should be emphasized; one's ownership or *having* necessarily comes to an end with death. What would then happen but for a power of disposition resting somewhere, where it could and ordinarily would be exercised so as to preserve and help on the social instinct which seeks to draw men together in the State, — that has already been suggested. The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man having property enough to excite a scramble. To prevent such a catastrophe the absolute owner has "title" or authority to make a will, as the one most likely to act in accord with

the social instinct; and in event of his failure to act, the State exercises the authority.

Thus disposition by testacy and disposition by intestacy stand upon the same footing and are expressions of the same deep purpose, to wit, the prevention of a vacancy and the failure of what is the very foundation of society and order, the social instinct. They do not express any theory of State or individual ownership of property forever. The individual in the case of testacy, the State in the case of intestacy, is an intermediary.

If still the question is raised, from what source emanates the authority which confers ownership upon devisee, legatee, or distributee, the answer is, the social instinct.[1] The power of disposition is conferred upon the owner or upon the State; it does not emanate from either. Nor does it emanate from the social instinct as fictitious owner of the property; the power is the expression of the social instinct as a social and political necessity. Ownership is not a necessary condition to conferring ownership.[2] To maintain the social order, power or authority, without being synonymous with robbery or injustice, may act and confer ownership. So it does act, it is conceived, in the matter of post-mortem disposal of property.

It does not make against this theory that in early times, among our Germanic ancestors, property always fell to heirs after the tenant's death; that is, that a property owner could not make a will having any force or effect in regard to the descent of the property. For, to put the case in the usual way, the property belonged to the family, as a sort of corporation; while the family continued, the community had nothing in the property. It is a different way of putting it, but it is probably true, also, to say that the property fell from father to child rather than, through a vacancy, to the man who could first lay his hands upon it.

[1] There lies the very source of law; law is only the drawing and keeping men together in society, — the fulfilling of the social instinct.

[2] That was a "marvellous thing" in the fifteenth century, when it was first seen that a mere direction to an executor to sell lands, which belonged by descent to the heir, could when acted upon by sale confer ownership. It was drawing "fire from a flint when there was no fire in the flint." Year Book, 9 Hen. VI. 24 b. But it is no marvel now.

It was better that the late tenant's kin should have it; and the only interest the community had in the matter was to see that the kin did have it. That interest on the part of the community was, however, the interest of self-preservation; not to regard it would be to invite anarchy to tear society to pieces.

It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land.[1] Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant, and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a transfer by rightful authority or power, not the gift of an owner.

Such appears to be the actual theory of the law. Still it is probably true, as has already been observed, that in the earlier period of the races which later became English, wills were not in use. The appearance of wills in the Germanic codes (the Leges Barbarorum) of a later time, was due to contact with Roman jurisprudence, and was borrowed from that source of civilization.[2] In the earlier period A's cattle, upon A's death, regularly passed to A's heirs, if he had any; A could not prevent it.[3] This fact directly raises another sort of question which the theory above presented naturally suggests, namely: Intestate disposition being the rule, how did disposition by will come about? *Whence* it came has already been noticed; it was the gift of Rome's expiring civilization to Rome's rude conquerors, awakened at last, by closer contact with that civilization, to a better life.[4]

[1] Wills of land were lawful and in constant use in England before the Norman conquest (1066).

[2] See Maine, Ancient Law, c. 6, p. 189; Abbott, p. 19.

[3] "When the phenomena of primitive societies emerge into light, it seems impossible to dispute a proposition which the jurists of the seventeenth century considered doubtful, that intestate inheritance is a more ancient institution than testamentary succession." Maine, Ancient Law, c. 6, p. 189; Abbott, p. 19.

[4] As to the wills in the Germanic codes, "they are almost certainly Roman. The most penetrating German criticism has recently been di-

But *how* did the making of wills come to be allowed? Equality, at least among male children, and indeed among daughters in the absence of sons, was the inveterate principle of the Germans in their original abodes north and east of the then conquering eagles of Rome.[1] Wills necessarily implied inequality.

The process by which wills came to be recognized appears to have been as follows.[2] The earliest lawful wills of our Germanic ancestors were based, it seems, (1) upon failure of kindred near enough, that is, within the family, to take by the regular method, intestacy; or they were (2) gifts of property to which such kindred had no direct claim. To find the evidence for the first of these cases would take us too far afield into early Germanic usage; for evidence of the second, it is not necessary to go back to the earlier home of the English people. It is still true, many centuries after the migration, in Norman England. Lands acquired by inheritance as family domain were considered more or less like entailed property, that is, property in which the "heir" had a legal interest in the lifetime of the tenant, so that the heir's consent was necessary to any transfer even *inter vivos*.[3]

The words of inheritance in our modern deeds, "to A and his heirs,"[4] were, in their Latin form, "et suis hæredibus," first brought into use in England in the twelfth or late in the eleventh century, following upon the establishment, effected towards the close of the eleventh century, of the (English) feudal tenures, in the case of feoffments or gifts of fiefs or feuds by lord to tenant. At the same time, it may

rected to these Leges Barbarorum, the great object of investigation being to detach those portions of each system which formed the customs of the tribe in its original home from the adventitious ingredients which were borrowed from the laws of the Romans. In the course of this process one result has invariably disclosed itself, that the ancient nucleus of the code contains no trace of a will. Whatever testamentary law exists has been taken from Roman jurisprudence." Maine, *at supra*.

[1] Preserved in Kent in Gavelkind, well called the common law of Kent.

[2] See Sir H. S. Maine, in the sixth chapter of his Ancient Law; also, Abbott's Cases, pp. 19 *et seq.*, where Maine is quoted at length.

[3] It is possible, though but barely possible, that there still survived a notion of the family as a corporation.

[4] The author is now using a note of his own to the fifth American edition by him of Jarman on Wills, II. 332.

be noticed, in immediate connection with these words of inheritance, reciprocal words declaring that the fief or feud was to be held of the feoffor "and his heirs" were introduced into the (oral or written) conveyance. The feoffment contemplated a relation forever between the donor and descendants and the donee and descendants.

In the times referred to, the "heir," as we have said, deemed himself in some sort included in the original gift of the lord, either as quasi tenant in tail, or as having some other interest of which he ought not to be deprived without his consent. In other words, the heir considered that he took, in modern phrase, by purchase. But the case was different in regard to lands which the ancestor had himself added to his estates by acquisition of his own.[1] With property so acquired the right of will-making, in regard to land, practically begins.

Testamentary disposition of personalty was everywhere much earlier, though not in western Europe, without important limitations. In the latter part of the thirteenth century Glanvill tells us that a man's goods were to be di-

[1] In the Custumal, known as the Laws of Henry the First, a book of the first half of the twelfth century, it is said that one who has bookland (land of inheritance conveyed by writing) from his "parentes" should not convey it away from his family. Henry I. c. 70, § 21; Placita Anglo-Normannica, Introd., 44, 45, note. In the reign of the same king (1100-1135) a son confirms, or rather makes anew, a gift of land made by his father to the Church, which had been adjudged good against the son. Placita Anglo-Norm., 128, 129. See also Hist. Mon. Abingdon, II. 136, anno 1104. About the year 1160 the Abbot of Abingdon sues a tenant named Pain "cum filio quem hæredem habuit" to recover fiefs forfeited, as alleged, by the father. Pain "et filius suus" entered into a concord with the abbot, and so terminated the suit. These were cases of gifts to the donee and his heirs.

Writing some twenty-five years later, Glanvill says that a man may make a will in his last sickness, "with the consent of his heir"; that he cannot "without his heir's consent" give any part of his inheritance to a younger son; and that he cannot disinherit "his son and heir" even as to land which he (the father) has bought, though if he have no heir of his body he may do as he will with such land. But he may convey a reasonable part of purchased property without consent of his bodily heir. Lib. 7, c. 1.

This special relation of the heir to his father's fief did not long survive the twelfth century, though traces of it appear in Bracton, who wrote in the reign of Henry the Third. See Lib. 2, c. 6, fol. 17 b. The word "assigns," — to the feoffee, his heirs and assigns, — which greatly helped alienation, was introduced into the feudal gift early in the thirteenth or late in the twelfth century.

vided into three equal parts, one for his heir, another for his widow, the third to be at his own disposal.[1] If he died without a wife, he might dispose of one half, the other half going to his children if any; if he had no children, his wife, if he had a wife, was to have half; and if he died without wife or children, he might dispose of the whole. Subject to differences of local custom, this continued to be true until the time of Charles the Second.[2] By this time personalty might be disposed of by will freely in the greater part of England,[3] the claims of the widow having continued, however, after those of the children had disappeared.[4]

The rise of primogeniture under feudalism in the Middle Ages appears to have created the occasion and demand for testamentary disposition. Originally, that is, before the fall of the Roman Empire, children among the German races, as we have seen, took equally; primogeniture, which of course destroyed all equality, was a thing of slow and gradual growth, beginning here and there with the feudal tie among the conquerors of Rome, and finally spreading over Europe; though not without admitting in various places some different custom, such as borough English, the converse of primogeniture, but equally fatal to the idea of equality among the children. And now, "as the feudal law of land practically disinherited all the children in favor of one, the equal distribution even of those sorts of property which [still] might have been equally divided ceased to be viewed as a duty."[5] And the way to carry out the owner's wishes,

[1] Glanvill, Lib. 7, c. 5. See Magna Charta of John (A. D. 1216), c. 26, of Henry III., 1216, c. 21, 1217, c. 22, 1224, c. 18; Bracton, 60 b; Fleta, Lib. 2, c. 57, § 10. So some fifteen years before Glanvill, in the Constitutions of Cashel, c. 6 (A. D. 1172), introducing English law into Ireland; but saying "children" where Glanvill says "heir." Giraldus Cambrensis, Conquest of Ireland, Lib. 1, c. xxxiv. Magna Charta, Bracton and Fleta, *ut supra*, and Regiam Maj., Lib. 2, c. 37, also say "children" instead of "heir." This casts a doubt upon the text of Glanvill; is it likely that primogeniture made such a great advance as that indicated by Glanvill, within a few years, and then, within another short time, fell back to its old position?

[2] See Blackstone, II. 491.

[3] The older usage of the common law, in favor of the widow and children, prevailed longer in Wales, in the province of York, and in London. Ibid.

[4] Maine, Ancient Law, c. 7, p. 217; Abbott, p. 26.

[5] Maine, c. 7, p. 217.

as a practical matter of method, was pointed out by Roman jurisprudence and usage. The clergy produced the Roman will, and used it as a model for the purpose in hand. The will has accordingly been called "an accidental fruit of feudalism." [1]

It should be added that primogeniture did not come into full operation in England until after the Norman conquest. On the Continent, however, it had gained full sway much earlier; hence we must turn to the Continent, as we have done, to find the statement true that testamentary disposition was due to primogeniture.[2]

[1] Ibid. On the various stages of the English will, see Pollock and Maitland's History of the English Law, II, 312-353. That subject is beyond the present purpose.

[2] Wills still appear to have a close connection in England with the position of the eldest son. It is stated that wills are frequently used there to aid or imitate that preference for the eldest son and his line which is a general feature in marriage settlements of land. Maine, *ut supra*. For the process and stages by which primogeniture came about, the reader is referred to the passages in the chapter in Maine's Ancient Law, above cited, and to the extracts from the same in Abbott's Cases, pp. 26-28.

76. MARRIAGE AND DIVORCE UNDER ROMAN AND ENGLISH LAW[1]

By James Bryce[2]

I. *Introductory*

IN all communities that have risen out of the savage state, no legal institution is at once so universal, and also so fundamental, a part of their social system as is Marriage. None affects the inner life of a nation so profoundly, or in so many ways, ethical, social, and economic. None has appeared under more various forms, or been more often modified by law, when sentiment or religion prescribed a change. In a famous passage which has been constantly quoted, and often misunderstood, Ulpian takes marriage as the type of those legal relations which are prescribed by the Law of Nature, and extends that Law so far as to make it govern the irrational creatures as well as mankind. If then the relation be so eminently natural, one might expect it to be also uniform. Yet it so happens that there is no relation with which custom and legislation have, in different peoples and at different times, dealt so differently. Nature must surely have spoken with a very uncertain voice when, as the jurist says, she 'taught this law to all animals.' Nor does this infinite diversity show signs of disappearing. While in most branches of law the progress of parallel development in various civilized states is a progress towards uniformity,

[1] This Essay was published in "Studies in History and Jurisprudence," 1901 (London and New York: Oxford University Press), pp. 782–833, 856–859, being part of Essay XVI in that work.

[2] A biographical note of this author is prefixed to Essay No. 10, in Volume I of this Collection.

so that the commercial law, for instance, of the chief European countries and of the United States is, as respects nineteen-twentieths of its substance, practically identical, the laws of these same countries are, in what relates to the forms of contracting marriage, the effect of marriage upon property rights, the grounds for dissolving and modes of dissolving marriage, extremely different, and apparently likely to remain different. Even within the narrow limits of the United Kingdom, England and Scotland have each its own system. Ireland has a different law from England in respect of the mode of solemnization; while, as respects divorce, the divergence goes so far that grounds are recognized as sufficient for divorce in Scotland which are not admitted in England, while in Ireland a divorce, except by private Act of Parliament, cannot be obtained at all. And the efforts to assimilate these three diverse systems made by reformers during two or three generations have been followed by so little practical result that they have been of late years altogether dropped.

Out of the long and obscure and intricate history of the subject, and out of the many still unsolved problems it presents, I propose to select one subject for discussion, viz. the history of the Roman law of the marriage relation, as compared with the English law, and particularly with some of the later developments of English law in the United States. On the antiquities of the matter, and in particular on the interesting and difficult questions relating to primitive forms of marriage, and to the polyandry which is supposed to have marked the earlier life of many peoples, I shall not attempt to touch. Neither can I do more than glance at the ecclesiastical history of the institution, important as the church has been in influencing civil enactments and moulding social sentiment.

To elucidate the Roman system, some few technical details must be given, but I shall confine myself to those which are needed in order to facilitate a comparison between it and that of England, and to show how essentially the later Roman conception of the relation differed from that which Christianity created in mediaeval Europe.

II. *Character of Marriage in Early Law*

When clear light first breaks upon the ancient world round the Mediterranean Sea we find that the relation of the sexes exists in three forms. The most savage tribes, such as those which Herodotus saw or heard of in Libya and Scythia, have no regular marriage at all. Some lived in a kind of promiscuity; some were probably polyandrous. The Eastern peoples — Persians, Lydians, Babylonians, and so forth — are polygamous, as was Israel in the days of Moses and Solomon, though in a much lesser degree after the Captivity, and as was the Trojan Priam of the Homeric poems. The Western peoples, and especially the Greeks and the Italians, were, broadly speaking, monogamous, although concubinage superadded to lawful marriage, especially among the Greeks, was not unknown. The contrast of the East and the West was marked; and this particular difference was not only characteristic but momentous, since it presaged a different course for the social development of the two regions.[1] So when the Teutonic and Celtic peoples came later on the stage, they too were generally monogamous, though among the heathen Celts the tie seems to have been somewhat looser than among the Teutons, and a plurality of wives may have been not uncommon in heathen times. Tacitus, while dwelling on the sanctity of German marriages, observes that occasionally the chieftains had more than one wife, owing to the wish of other families for alliance with them.[2] Polygamy slowly died out of the East under Roman rule, though possibly never quite extinguished, for we find prohibitions of it renewed by the Emperors down to Diocletian, before whose time all subjects had become citizens. It maintained itself in the Oriental court of the Sassanid kings of Persia, and was indeed one of the features of Persian life which most shocked the philosophers of the later Roman Empire. As there is no trace of it in the Roman

[1] Euripides (*Androm.* vv. 173-180) contrasts the marriage usages of barbarians and Greeks, and dilates (cf. v. 465 sqq.) on the evils of polygamy.

[2] Tac. *Germ.* c. xviii.

law,[1] it need not concern us further, since it has never, except in the singular instance of the Mormons, reappeared in any of the communities which have been regulated either by Roman or by Teutonic law.[2]

Before describing the Roman system, let us note three general features which belong to the marriage customs, not indeed of all, but certainly of most peoples in the earlier stages of civilization. They are worth noting, because they constitute the central threads of the history of the relation during civilized times.

(1) The marriage tie has more or less of a religious or sacred character, being generally entered into with rites or ceremonies which place it under supernatural sanctions. This is, of course, more distinctly the case where monogamy prevails.

(2) In the marriage relation the husband has a predominant position both as regards control over the person and conduct of the wife, and as regards property, whether that which was hers or that which was brought into common stock by her and by him.

(3) The tie is comparatively easy of dissolution by the husband, less easily dissoluble by the wife. This is a natural consequence of the inferior position which she holds in early society.

Although these three features are generally characteristic of the earlier stages of family law, they are not universally present; and their presence or absence in any given community does not necessarily coincide with a lower or higher scale of civilization in that community. The temptation to generalize in these matters is natural, but it is dangerous. True as may seem the general proposition, that the higher or lower position of women in any society is a pretty good index to the progress that society has made, there are too many exceptions to the rule for us to take it as a point of

[1] Although Julius Caesar, if we may credit Suetonius, caused a measure to be drafted for enabling him to marry as many wives as he liked for the sake of having legitimate issue (Suet. *Julius*, c. 52).

[2] Among the Jews it was (though forbidden by Roman law) not formally abolished till the tenth century.

departure for inquiry. Nor can these exceptions be always accounted for by any one cause, such as race or religion.

III. *The Earlier Form of Roman Marriage Law*

Now let us come to the Romans, of whom we may say that it is they who have built up the marriage law of the civilized world, partly by their action as secular rulers in pagan times, partly by their action as priests in Christian times. The other modifying elements, and particularly the Hebrew and Teutonic influences, which have worked upon the marriage laws of Christendom, are of quite inferior moment.

Roman law begins with two phenomena which seem at first sight inconsistent. One is the complete subjection of the wife to the husband on the legal side, as regards both person and property. The other is her complete equality on the social and moral side, as regards her status and the respect paid to her.

In describing the nature of this subjection, one must make it clearly understood that, strictly speaking, it was not by the mere fact of marriage, that is to say, by the legal act necessary to constitute marriage, that a woman entered that position of absolute absorption into the legal personality of her husband which is so remarkable a feature of the old law. Whatever may have been the case in prehistoric times, we find that at the time when the Twelve Tables were enacted (B. C. 449) a marriage could be contracted without any forms or ceremonies whatever, by the sole consent of the parties; and that, where this was the case, the husband did not acquire any power over the wife, and the latter retained whatever property she previously possessed. It was therefore not marriage *per se* that created the power of the husband, for a woman might be legally married and not be under the marital power. But although this 'free marriage,' as we may call it (the term is not Roman, but invented by modern jurists), was legally possible, the custom, and in old days the almost invariable custom, of the people was to add to the marriage a ceremony not essential to its

validity as a marriage, but one which had important legal consequences. We may safely assume that there was originally no true marriage without the ceremony, but at the time of the Twelve Tables this was no longer the case. The ceremony created a relation which the Romans called Hand (*manus*), and brought the wife into her husband's power, putting her, so far as legal rights went, in the position of a daughter (*filiae loco*). It gave the husband all the property she had when she married. It entitled him to all she might acquire afterwards, whether by gift or by her own labour. It enabled him to command her labour, and even to sell her, though the sale neither extinguished the marriage nor made her a slave, but merely enabled the purchaser to make her work, while still requiring him to respect her personal rights.[1] In compensation for these disadvantages the wife became entitled to be supported by her husband, and to receive a share of his property at his death, as one of the 'family heirs' (*sui heredes*), whom he could disinherit only in a formal way. She had by coming under his Hand passed out of her original family, and lost all right by the strict civil law to share in the inheritance of her father.

There were two forms of ceremony by which this power of the Hand could be created. One, probably the older, had a religious character. It took place in the presence of the chief pontiff, and its main feature was a sacrifice to Jupiter, with the eating by the bride and bridegroom of a cake of a particular kind of corn (*far*), whence it was called *confarreatio*. It was originally confined to members of the patrician houses. The other was a purely civil act, and consisted in the sale by the bride of herself, with the approval of her father or her guardian (as the case might be), to the bridegroom, apparently accompanied (though there is a controversy on this point) by a contemporaneous sale by the bridegroom of himself to the bride. The transaction was carried out with certain formal words and in the pres-

[1] Some writers doubt whether this power of sale existed, and refer to a supposed 'law of Romulus' mentioned by Plutarch which devoted to the infernal gods whoever sold his wife. But the balance seems to incline in favour of the existence of the power.

ence of five witnesses (being citizens),[1] besides the man who held the scales with which the money constituting the price was supposed to be weighed. The price was of course nominal, though it had in very early times been real.

These two forms have been frequently spoken of as if they were indispensable forms of marriage, so that marriage had always the Hand power as its consequence. But this, though it may probably have been the case in very early days, was not so in those historical times to which I must confine myself. And the proof of this may be found in the fact that if a woman was married without either of the above forms, she did not pass into the Hand of her husband unless or until she had lived with him for a year, and not even then if she had absented herself from his house for three continuous nights during that year.[2] And where the Hand power had not been created, the property rights of the wife, whatever they were,[3] remained unaffected by the marriage. The period of three nights is fixed in the Twelve Tables, possibly as a precise definition of a custom previously more uncertain.

This was the old Roman system, and a very singular system it was, because it placed side by side the extreme of marital control as the normal state of things and the complete absence of that control as a possible state of things. Doubtless the marriages with Hand were in early days practically universal, resting upon a sentiment and a social usage so strong that women themselves did not desire the free marriage, which would put them in an exceptional position, outside the legal family of the husband. Nor can we doubt that the wide power which the law gave to the husband was in point of fact restrained within narrow limits, not only by affection, but also by the vigilant public opinion of a comparatively small community.

[1] There has been much dispute as to this ceremony: I give what seems the most probable view. It may descend from a more ancient sale of the wife by her relatives to the husband, similar to that which we find in some primitive peoples.

[2] This was in pursuance of the general rule that rights over a movable were acquired by a year's continuous holding: 'usus auctoritas fundi biennium, caeterarum rerum annuus esto.'

[3] If she was in the power (*potestas*) of her father, she had no property of her own. If she was *sui iuris*, she was under guardianship.

IV. *Change from the Earlier to the Later System at Rome*

Before the close of the republican period the rite of *confarreatio* practically died out, or was referred to as an old-world curiosity, much as a modern English lawyer might refer to the power of excommunication possessed by ecclesiastical authorities. The patrician houses had become comparatively few, and the daughters of those that remained evidently did not wish to come under the Hand power.[1] The form of *coemptio*, which all citizens might use, lasted longer, and seems to have been not infrequently applied in Cicero's time. Two centuries later it also was vanishing, and Gaius tells us that the rule under which uninterrupted residence created the husband's power of Hand, and might be stopped by the wife's three nights' absence, had completely disappeared (Gai *Inst.* i. 111). So we may say broadly that from the time of Julius Caesar onwards the marriage without Hand had become the rule, while from the time of Hadrian onwards the legal acts that had usually accompanied marriage, which placed the wife under the husband's control, were almost obsolete.

This was a remarkable change. The Roman wife in the time of the Punic Wars had, with rare exceptions, been absolutely subject to her husband. She passed out of her original family, losing her rights of inheritance in it. Her husband acquired all her property. He could control her actions. He sat as judge over her, if she was accused of any offence, although custom required that a sort of council of his and her relatives should be summoned to advise him and to see fair play. He could put her to death if found guilty. He could (apparently) sell her into a condition practically equivalent to slavery, and could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liability. One

[1] Nevertheless it was retained in a few families for the purpose of providing persons who could hold four great priestly offices, since by ancient usage none save those born from a marriage with confarreation were able to serve these priesthoods. But its operation seems to have been restricted by a decree of the senate so as to apply only so far as religious rites were concerned (*quoad sacra*) (Gai *Inst.* i. 136).

can hardly imagine a more absolute subjection to one person of another person who was nevertheless not only free but respected and influential, as we know that the wife in old Rome was. It would be difficult to understand how such a system worked did we not know that manners and public opinion restrain the exercise of legal rights.

Such was the old practice. Under the new one, universal in the time of Domitian and Trajan, which is also the time of Tacitus, Juvenal and Martial, the Roman wife was absolutely independent of her husband, just as if she had remained unmarried. He had little or no legal power of constraint over her actions. Her property, that which came to her by gift or bequest as well as that which she earned, remained her own to all intents and for all purposes. She did not enter her husband's family, and acquired only a very limited right of intestate succession to his property.

This striking contrast may be explained by the fact that the disabilities which attached to the wife under the old system were not in legal strictness the consequence of marriage itself, but of legal acts which an almost universal sentiment and custom had attached to marriage, though in themselves acts distinct from it. A perfectly valid marriage could exist without these legal acts, and so far back as our authorities carry us, we find that a few, though probably originally only a very few, marriages did take place without them. Accordingly when sentiment changed, and custom no longer prescribed the use of confarreation or coemption, the power of Hand vanished of itself and vanished utterly. Had it been an essential part of the marriage ceremony, it would doubtless have been by degrees weakened in force and accommodated to the ideas of a new society. But no legislation was needed to emancipate the wife. The mere omission to apply one or other of the old concomitants gave the marriage relation all the freedom the parties could desire and perhaps more than was expedient for them.

We may now dismiss these ancient forms and address ourselves to the position of the wife under the normal marriage of later times — the so-called 'free marriage,' since this is

the form in which the Roman institution descended to and has affected modern law.[1]

V. *Later Marriage Law: Personal Relation of the Consorts*

The following points deserve to be noted as characterizing the Roman view.

The act whereby marriage was contracted was a purely private act. No intervention of any State official, no registration or other public record of any sort was required. The two parties, and the two parties only, were deemed to be concerned.[2]

The act was a purely civil act, to which no religious or ecclesiastical rite was essential either in heathen or in Christian times. There were indeed what may be called decorative ceremonies, some of which we find mentioned in poems like the famous Epithalamium of Catullus, but they had no more to do with the legal nature and effect of the matter than has the throwing of old shoes or rice at a modern English wedding.

The act required no prescribed form. It consisted solely in the reciprocally expressed consent of the parties, which might be given in any words, or be subsequently presumed from facts. 'Marriage is contracted by consent only' (*nuptiae solo consensu contrahuntur*) is the invariable Roman maxim. Even the conducting of the bride to the bridegroom's house, which has sometimes been represented as necessary,[3] seems to have been regarded rather as evidence

[1] I pass by the distinction between *iustae nuptiae*, which could be contracted only between Roman citizens, and the so-called 'natural' marriage, or *matrimonium iuris gentium*, which was created by the marriage of a full citizen to a half citizen or an alien (*peregrinus*), because the latter is of no consequence for our purpose, and practically disappeared when all Roman subjects became citizens. It was a perfectly valid marriage, and the children were legitimate. As to their status, see Gaius, *Inst.* i. 78, 79.

[2] Where either party was subject to the paternal power of his or her father (or grandfather), the consent of the father (or grandfather) (or both) was required, though in a few specified cases it might be either dispensed with or compelled. This was a consequence of the Roman family system. It was irrespective of the age of bride or bridegroom.

[3] The Emperor Majorian (A. D. 455–461) is said to have issued a constitution for the Western Empire, making the creation of a *dos* essen-

needed in certain cases than as essential to the validity of the act.[1] A generally prevalent usage made a formal betrothal (*sponsalia*) precede the actual wedding. But the betrothal promise created no legal right. No action lay upon it, such as that which English and Anglo-American law unfortunately allows to be brought for breach of promise of marriage. In early times formal and binding stipulations seem to have been often made on each side between the bridegroom and the father (or other male relative) of the bride for the giving and receiving of the bride; and if the promise were broken without sufficient cause, an action lay against the party in fault for the worth of the marriage.[2] This, however, disappeared. Under the influence of a more refined sentiment, not only could no promise of marriage be enforced, but if the parties made a contract whereby each bound him or herself to the other in a penal sum to become payable in case of breach, such a provision was held to be disgraceful (*pactum turpe*) as well as invalid. This was the law of later republican and imperial times. Betrothal had, however, some legal effects. It entitled either of the betrothed parties to bring an action for an injury (of an insulting nature) offered to the other. It rendered any one infamous who being betrothed to one person contracted betrothal to another. It entitled either party, if the espousal was broken off before marriage, to reclaim whatever gifts he or she might have bestowed upon the other.

As regards personal status, the wife acquired that of her husband (unless either had been formerly a slave), and his domicil became hers. In the old days of Hand power she had taken the name of his *gens*, but now she retained her

tial to the validity of a marriage; but this provision, which can hardly have been intended to be general, seems to have never taken effect. The Western Empire was then in the throes of dissolution.

[1] See Paul., *Sent. Recept.* xix. 8; *Dig.* xxii. 2. 5. The suggestion which may be found in some modern writers that Marriage fell within the class of the contracts created by the delivery of an object (the so-called Real Contracts), has no Roman authority in its favour, and is indeed based on a misconception of the nature of those four contracts, in all of which the obligation created is for the restoring of the object delivered. Marriage is assuredly not a bailment.

[2] This was at any rate a usage among the Latins; but how far in Rome seems doubtful.

own, besides her personal 'first name' (*praenomen*) (*e. g.* Tertia).[1] Each spouse being interested in the character and reputation of the other, he could sue for damages if any insult was offered to her, she for insult to him. He is bound to support her in a manner suitable to their rank, whatever her private means may be. Though each can bring an action against the other, the action must not be one which affects personal credit and honour (*actio infamans*), and hence, though each has his and her own property, neither can proceed against the other by a civil action of theft, even if the property seized was seized in contemplation of a divorce.[2] It need hardly be added that if the wife's father, or grandfather, were living, she would remain, unless she had been emancipated, subject to the paternal power, being for all legal purposes a member of her original family and not of her husband's. But the person in whose power she is cannot (at least in imperial days) take her away from her husband. Antoninus Pius forbade a happy marriage to be disturbed by a father; and in the third century (perhaps earlier) the husband could proceed by way of interdict to compel a father to restore his wife to him.[3]

VI. *Later Law. Pecuniary Relations of the Consorts*

This curiously detached position of the two consorts expressed itself in their pecuniary relations. Each had complete disposal of his or her property by will as well as during life, though the wife needed, down to a comparatively late time, the authority of her guardian.[4] Neither had originally any right of succession to the other in case of intestacy, nor had the wife any right of intestate succession to her chil-

[1] Under the Empire we usually find women using two names, from their father's *gens* and family (e. g. *Caecilia Metella*). Sometimes, it would seem, the name of the father's *gens* was followed by one taken from the mother (e. g. *Iunia Lepida, Annaea Faustina*). The subject is fully discussed by Mommsen, in his *Römisches Staatsrecht.*

[2] A special action (*rerum amotarum*) was given in this case. Some jurists held that the joint enjoyment of household goods made the conception of Theft inapplicable to a wife's dealings, however unauthorized, with her husband's property. *Dig.* xxv. 2. 1.

[3] *Dig.* xliii. 30. 2.

[4] The guardianship of women of full age seems to have died out after women received power to select a guardian for themselves, a change which of course made his action purely formal.

dren nor they to her, except that which the Praetor gave them among the blood relatives (*cognati*) generally, after the agnates (persons related through males). A state of things so inconsistent with natural feeling could not however always continue, so the Praetor created a rule of practice whereby each consort had a reciprocal right of succession to the other. But even in doing so, he placed this succession after that of other blood relations, as far as the children of second cousins. This postponement of a consort to blood relatives was carried even further by Justinian's legislation, for that emperor extended the category of relatives who could succeed in case of intestacy, and made no provision for the wife (beyond that which the Praetor had made), except to some small degree in case of a necessitous widow. The relationship of mother and child received a somewhat fuller recognition, for laws (*Senatus Consultum Tertullianum, Sc. Orphitianum*) of the time of Hadrian and Marcus Aurelius gave the mother and the children reciprocal rights of inheritance,[1] which, finding a place in the general scheme of succession based on consanguinity which Justinian established, have passed into modern law.

Distinct as were the personalities of the two consorts in respect of property, the practical needs of a joint life recommended some plan under which a provision might be made for the expenses of a joint household. This sprang up as soon as marriages without the concomitant creation of the Hand power had grown common. It became usual for the wife to bring with her land or goods, either her own, if she were independent, or bestowed by her father or other relative. This property, which was destined for the support of the married pair and their children, was called the *Dos*, a term which, since it denotes the wife's contribution to the matrimonial fund, must not be translated by our English word Dower, for that term describes the right of a wife who survives her husband to have a share in his landed estate. Many rules sprang up regarding the *Dos*, rules probably due in the first instance to custom, for as the instruments

[1] The mother's succession was originally granted only where she had borne three children (if a freed-woman, four).

of marriage contracts were usually drawn on pretty uniform lines, these lines ultimately became settled law.[1] The general principle came to be that property given from the wife's side, whether by her father, or by herself, or by some of her relatives, became subject to the husband's right of user while the marriage lasted, as enabling him to fulfil his obligation to support wife and children, but at the expiry of the marriage by the death (natural or civil) of either party, or by divorce, reverted to the wife or her heirs.[2] If, however, the property had been given by the wife's father, he might, if still living, reclaim it.[3] The *Dos* is said by the Romans to be given for the purpose of supporting the burden of married housekeeping, and therefore the administration and usufruct of it pertain to the husband, while the ultimate ownership remains in the wife, or in the father who constituted it, as the case may be. In the later imperial period a sort of second form of matrimonial property was introduced, called the gift for the sake of marriage (*donatio propter nuptias*). It was made by the husband, and remained his property both during and after the marriage. So far, as it was only theoretically separated from other parts of the husband's estate, it might seem to have no importance. But if he became insolvent, it did not, like the rest of his property, pass to his creditors, but went over to the wife, just as the *Dos*, although administered by the husband, remained unaffected by his insolvency. And just as the husband was entitled, where a divorce was caused by the wife's fault, to retain a part of the *Dos*, so if a divorce was caused by the husband's fault, the *donatio propter nuptias*, or a part of it, might be claimed by the injured wife. The similarity of some of these arrangements to the prac-

[1] The 'custom of conveyancers' has worked itself into English law in a somewhat similar way.

[2] This was the rule as settled by Justinian. Before his time, the husband took the *Dos* at the wife's death unless it had been given by her father.

[3] There are many less important rules regarding the extent of the husband's interest and the form in which the property is to be restored at the end of the marriage, which it is not necessary to set forth, as they do not affect the general principle. Indeed generally through these pages I am forced, for the sake of clearness and brevity, to omit a number of minor provisions.

tice of English marriage settlements will occur to every one's mind, though in England settlements are always created and governed by the provisions of the deeds which create them, whereas in Rome, although special provisions were frequently resorted to, there arose a general legal doctrine whose provisions were applicable to gifts made upon or in contemplation of marriage.

One further point needs to be mentioned. It was a very old customary (or, as we should say, common law) rule of Roman law that neither of the wedded pair could during the marriage bestow gifts upon the other, the reason assigned being the risk that one or other might by the exercise of the influence arising from their relation be deprived of his or her property to his or her permanent damage (*ne mutuato amore invicem spoliarentur*). This principle, which protects the wife from being either wheedled or bullied out of her separate property, and may be compared with the English restraint on alienation or anticipation applied to a wife's settled property, was also held to be occasionally needed to protect the husband's interests, and those of the children, from suffering at the hands of a grasping wife. It issues from the view which the Roman jurists enounce that affection must not be abused so as to obtain pecuniary gain; and one jurist adds that if either party were permitted to make gifts the omission to make them might lead to the dissolution of the marriage, and so the continuance of marriages would be purchasable.[1] Such gifts were accordingly held null and void, the only exception being that where property actually given had been left in the donee's hands until the donor's death, the heir of the donor could not reclaim it from the surviving donee. Needless to say that the rule only covered serious transfers of property, and did not apply to gifts of dress or ornaments or such other tokens of affection as may from time to time pass between happy consorts.

[1] 'Sextus Caecilius et illam causam adiciebat, quia saepe futurum esset ut discuterentur matrimonia si non donaret is qui posset atque ea ratione eventurum ut venalicia essent matrimonia.' This view was sanctioned by the Emperor Caracalla in his speech to the senate, which introduced the exception next mentioned in the text; *Dig.* xxiv. 1. 2.

VII. *General Character of the Roman Conception of Marriage*

Reviewing the rules which regulated marriage without the Hand Power, the sole marriage of the classical times of Roman law, we are struck by three things.

The conception of the marriage relation is an altogether high and worthy one. A great jurist defines it as a partnership in the whole of life, a sharing of rights both sacred and secular.[1] The wife is the husband's equal.[2] She has full control of her daily life and her property. She is not shut up, like the Greek wife, especially among the Ionians, in a sort of Oriental seclusion, but moves freely about the city, not only mistress of her home, but also claiming and receiving public respect, though so far placed on a different footing from men, and judged by a standard more rigid than ours, that it was deemed unbecoming for her to dance and shocking for her to drink wine.

The marriage relation is deemed to be wholly a matter of private concern with which neither the State nor (in Christian times) the Church has to concern itself. This was so far modified under the Emperors, that the State, from the time of Augustus, began to try to discourage celibacy and childlessness in the interests of the maintenance of an upper class Roman population, as opposed to one recruited from freed men and strangers. But these efforts were not, as we shall see, incompatible with adherence to the general principle that the formation and dissolution of the tie required no State intervention, nor even any form prescribed by State authority.

The marriage relation rests entirely on the free will of the two parties.[3] If either having promised to enter it refuses to do so, no liability is incurred. If either desires to quit it, he or she can do so. Within it, each retains his

[1] 'Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio;' Modestinus in *Dig.* xxiii. 2. 1.

[2] This was expressed in the phrase which the bride anciently used when brought to the husband's house: 'Ubi tu Gaius, ego Gaia.'

[3] 'Libera matrimonia esse antiquitus placuit,' says the Emperor Severus Alexander in the third century. *Cod.* viii. 38. 2.

or her absolute freedom of action, absolute disposal of his or her property.

Compulsion in any form or guise is utterly opposed to a connection which springs from free choice and is sustained by affection only.

These principles have a special interest as being the latest word of ancient civilization before Christianity began to influence legislation. They have in them much that is elevated, much that is attractive. They embody the doctrines which, after an interval of many centuries, have again begun to be preached with the fervour of conviction to the modern world, especially in England and the United States, by many zealous friends of progress, and especially by those who think that the greatest step towards progress is to be found in what is called the emancipation of woman.

VIII. *Divorce in Roman Law*

Let us now see how the Roman principles aforesaid worked out in practice as regards domestic morality and the structure of society, that structure depending for its health and its strength upon the purity of home life at least as much as it does upon any other factor.

The last of the above-stated three principles is the derivation of all the attributes of the marriage relation from the uncontrolled free will of the parties. This principle is applied to the continuance of the relation itself. With us moderns the tie is a permanent tie, which, though freely formed, cannot be freely dissolved, whether by one of the parties or by both. Very different was the Roman view. To them it is even less binding than an ordinary business contract. Take for instance a bargain made between *A* and *B* for the sale and purchase of a house. Such a bargain creates what the Romans call an obligation, a bond of law (*vinculum iuris*) which enables either of the contracting parties to require the other to fulfil his promise, or to pay damages in case of default. In Roman law the act of entering into marriage creates no such bond. The business contract can be rescinded only by the consent of both the parties

to it. The marriage relation can be terminated by the will of one only. Each party in forming it promised only that he, or she, would remain united to the other so long as he, or she, desired so to remain united. This is the logical consequence of the principle that marriages should be free; this was how the Romans understood that principle.

Accordingly divorce can be effected by either party at his or her pleasure, the doctrine of equality between the sexes being impartially applied, so that the wife may just as freely and easily divorce her husband as the husband may divorce his wife.

The early history of the matter is somewhat obscure, and need not detain us. It would seem probable that in the old days when marriage was accompanied by the Hand power, a husband might put away his wife if she had been convicted before the domestic council of certain grave offences;[1] and we gather that in such cases she was entitled to demand her emancipation, *i. e.* the extinction of the Hand power, by the proper legal method thereto appointed. Such cases were, however, extremely rare. When marriage unaccompanied by Hand power became frequent, we do not at first hear of any divorces. Our authorities declare that the first instance of divorce at Rome (they probably mean the first where no crime was alleged) was furnished by a certain Spurius Carvilius Ruga, who in B. C. 231 got rid of his wife, although warmly attached to her, on account of her sterility. Universal displeasure fell upon him for his conduct: and when L. Antonius put away his wife without summoning a council of friends and laying the matter before them, the Censors removed him from his tribe. But before long other husbands were found to imitate Spurius Carvilius. In the second century B. C. divorce was no longer rare. In the days of Julius Caesar it had become common, and continued to be so for many generations. The fragrance of religious sentiment had ceased to hallow marriage, and in the general

[1] A so-called 'law of Romulus' is said to have enumerated poisoning the children, adultery, and the use of false keys as grounds justifying the husband in divorcing his wife, no parallel right being granted to her. And there seems to have been a provision regarding divorce in the Twelve Tables.

decline of morals and manners it was one of the first institutions to suffer degradation. Not only Cn. Pompey, but such austere moralists as Cato the younger and the philosophic Cicero put away their wives: Cato his after thirty years of wedded life, Cicero two in rapid succession.

How far this decline had gone, even before the days of Cato and Cicero, appears from the singular speech delivered by Q. Caecilius Metellus, Censor in B. C. 131, in which he recommended a law for compelling everybody to marry, observing that if it were possible to have no wives at all, everybody would gladly escape that annoyance, but since nature had so ordained that it was not possible to live agreeably with them, nor to live at all without them, regard must be had rather to permanent welfare than to transitory pleasure.[1] We are told that both men and women, especially rich women, were constantly changing their consorts, on the most frivolous pretexts, or perhaps not caring to allege any pretext beyond their own caprice. Nothing more than a declaration of the will of the divorcing party was needed: and this was usually given by the husband in the set form of words, 'keep thy property to thyself' (*tuas res tibi habeto*). Little or no social stigma seems to have attached to the divorcing partner, even to the wife, for public opinion, in older days a rigid guardian of hearth and home, had now, in a rich, luxurious, and corrupt society, a society which treated amusement as the main business of life, come to be callously tolerant. There were still pure and happy marriages, like that of Cn. Julius Agricola (the conqueror of Britain) and Flavia Domitilla; nor is it necessary to suppose that conjugal infidelity was the chief cause why unions were so lightly contracted and dissolved, for the mere whims of self-indulgent sybarites account for a great deal.[2] Still

[1] 'Si sine uxore, Quirites, possemus esse, omnes ea molestia careremus, sed quoniam ita natura tradidit ut neque cum illis commode nec sine illis ullo modo vivi possit, saluti perpetuae potius quam brevi voluptati consulendum.' Aul. Gell. *Noct. Att.* i. 6: cf. Liv. *Epit.* Book lix, and Sueton. *Vit. Aug.* Augustus, according to Gellius and Suetonius, caused this speech, delivered a century before, to be read aloud in the Senate in support of his bill *De Maritandis Ordinibus*, as being one which might fitly have been made for their own times.

[2] 'Aut minus aut certe non plus tricesima lux est
Et nubit decimo iam Thelesina viro.' Mart. vi. 7.

the main facts — the prevalence of divorce, the absence of social penalties, and the general profligacy of the wealthier classes — admit of no doubt.

The Emperor Augustus, though by no means himself a pattern of morality, was so much alarmed at a laxity of manners which threatened the well-being of the community, as to try to restrict divorces by requiring the party desiring to separate to declare his or her intent in the presence of seven witnesses, being all full Roman citizens. This rule, enacted by the *lex Iulia de adulteriis*, and continued down till Justinian's time, does not seem to have reduced the frequency of divorces, though it would tend to render the fact more certain in each case by providing indubitable evidence. Martial and Juvenal present a highly coloured yet perhaps not greatly exaggerated picture of the license of their time; and Seneca truly observes that when vice has become embodied in manners, remedies avail nothing (*Desinit esse remedio locus ubi quae fuerant vitia mores sunt*).

IX. *Influence of Christianity on the Roman Divorce Law*

But a force had come into existence which was to prove itself far more powerful than the legislation of Augustus and his successors. The last thing that these monarchs looked for was a reformation emanating from a sect which they were persecuting, and from doctrines which their philosophers regarded with contempt. Christianity from the first recognized the sanctity of marriage, and when it became dominant (though for a long time by no means omnipotent) in the empire a new era began. The heathen emperors might probably have been glad to check the power of capriciously terminating a marriage, but public opinion, which clung to the principle of freedom, would have been too strong for them. All they did was to impose pecuniary penalties on the culpable party by entitling the husband to retain one-sixth of the *Dos* in case of the wife's infidelity, one-eighth if her faults had been slighter, to which, if there were children, one-sixth was added in respect of each child, but so as not to exceed one-half in all. (The custody of the

children belonged to the father in respect of his paternal power.) If the husband was the guilty party, he was obliged to restore the *Dos* at once, instead of being allowed a year's grace.

Constantine and his successors had a somewhat easier task, because the Church had during several generations given to marriage a religious character, surrounded its celebration with many rites, and pronounced her benediction upon those who entered into it. A new sentiment, which looked on it as a union permanent because hallowed was growing up, and must have to some extent affected even heathen society, which remained for a century after Constantine both large and influential. Nevertheless, even the Christian emperors did not venture to forbid divorce. They heightened the pecuniary penalties on the party to blame for a separation by providing that where the misconduct of the wife gave the husband good grounds for divorcing her, she should lose the whole of the *Dos*, and where it was the husband's transgressions that justified the wife in leaving him, he should forfeit to her the property he had settled, the *donatio propter nuptias*. In both these cases the ultimate ownership of these two pieces of marriage property was reserved to the children, if any, the husband or wife, as the case might be, taking the usufruct or life interest. If there was no *Dos* or *Donatio*, then the culpable party forfeited to the innocent one a fourth part of his or her private property. The definition of misconduct included a frivolous divorce, so that capricious dissolutions were in this way discouraged.

If there were no fault on either side, but one or other partner desired to put an end to the marriage for the sake of entering a convent, or because the husband had been for five years in foreign captivity,[1] or because there had never been any prospect of offspring, such a divorce was allowed, and carried no pecuniary penalty with it. It was called *divortium bona gratia*.

Finally, if both the parties agreed of their own free

[1] The older doctrine had been that foreign captivity destroyed marriage *ipso facto*.

wills to separate — the *divortium communi consensu* — they might do so without assigning any cause or incurring any liability. This rule, which prevailed from first to last, and is recognized even in the Digest and Code of Justinian, was only once broken in upon. In an ordinance issued by Justinian in his later years (*Novella Constitutio* cxxxiv) the pious austerity of the reformer broke out so vehemently as to enact that where husband and wife agreed to divorce one another without sufficient ground, both should be incapable of remarriage and be immured for life in a convent, two-thirds of their property going to their children. Even then, however, the emperor did not venture to pronounce the divorce legally invalid. The will of the parties prevails, and they die unmarried, though they die in prison. This violation of the established doctrine was, however, too gross to stand. It excited general displeasure, and was repealed by Justin the Second, the nephew and successor of Justinian. So the divorce by consent lasted for some centuries longer, till in an age which had forgotten the ancient Roman ideas and was pervaded by the conception of the marriage relation which religion had instilled, the Emperor Leo the Philosopher declared this form of separation to be invalid.

Through the whole of this legislation on the subject of divorce, which is far more minute and intricate than the briefness of the outline here presented can convey, it is to be noted that the Romans held fast to two principles. One was the wholly private, the other the wholly secular, character of wedlock. There is no legal method prescribed for entering into a marriage, nor any public record kept of marriages. There is no suit for divorce, no public registration of divorce. The State is not invoked in any way. Neither is the Church. Powerful as she had grown before Justinian's time, even that sovereign does not think of requiring her sanction to the extinction of the marriage which in most cases she had blessed. Either party has an absolute right to shake off the bond which has become a fetter. He or she may suffer pecuniarily by doing so, but the act itself is valid, valid against an innocent no less than against a guilty partner, and valid to the extent of permitting remar-

riage, except (as observed in the last paragraph) for a few years at the end of Justinian's reign.

Religion had consecrated the patrician marriage with the sacred cake in early days, and there had been a public character in the so-called plebian marriage with the scales and five witnesses. But the marriage of the Christian Empire was (so far as law went) absolutely secular and absolutely private.

X. *Some other Features of Roman Marriage Law*

Before leaving this part of the subject, a few minor curiosities of the Roman marriage law deserve to be mentioned. From the time of Augustus there were in force, during some centuries, various provisions [1] designed to promote marriage and the bearing of children by attaching certain burdens or disabilities to the unmarried and childless. Most of these, being opposed to the new sentiment which Christianity fostered, were swept away by the Emperor Constantine and his successors. Others fell into desuetude, so that before Justinian's time few and slight traces were left of statutes that had exerted a great influence in earlier days, though it may be doubted whether they did much to promote morality. The tendency of Christian teaching rather was in favour of celibacy, when adhered to from ascetic motives; and the passion for a monastic life which marked the end of the fourth century told powerfully in this direction, especially in the eastern half of the empire.

Similar sentiments worked to discourage second marriages, which earlier legislation had favoured, though the widow who remarried within the year of mourning (originally of ten, ultimately of twelve months) suffered infamy, by a very ancient custom, as did the person who wedded her. The marriage was, however, valid. The Christian emperors punished the consort who married again by debarring him or her from the full ownership of any property which came to him or her through the first marriage (*lucra nuptialia*), while leaving him (or her) the usufruct in it. But this

[1] Especially those contained in the *lex Iulia et Papia Poppaea*.

applied only where there were children of the first marriage living, and was mainly prompted by a desire to protect their interests against a step-parent. The ancient world was singularly suspicious of step-mothers.

The rules with regard to prohibited degrees of matrimony varied widely from age to age. In early Rome even second cousins were forbidden to intermarry. There was in those days a usage permitting near relatives, as far as second cousins, to kiss one another without incurring censure (*ius osculi*). Plutarch oddly explains the permission as grounded upon the right of the male relatives to satisfy themselves in this way that the ladies of the family had not tasted wine. But obviously the wholesome habits of a simple society allowed a familiar intercourse among kinsfolk just as far, and no farther, as the prohibition of marriage between them extended.[1] Towards the end of the republican period, however, we find that even first cousins might marry, probably by custom, for we hear of no specific enactments. Tacitus (*Ann.* xii. 6) refers to the practice as well established. This freedom lasted till the Emperor Theodosius the First, who forbade their marriage under pain of death by burning. Though the penalty was subsequently reduced, marriages of first cousins continued to be forbidden and punishable in the western half of the empire, while in the eastern they were made permissible, and remained so in the system of Justinian. The marriage of uncle or aunt with niece or nephew had been prohibited, though apparently by no statute, until the Emperor Claudius, desiring to marry his brother's daughter Agrippina, obtained a decree of the Senate declaring such a marriage legal.[2] So it remained for a time, though the marriage of an uncle with a sister's daughter, or of an aunt with a nephew, was still deemed incestuous. Christianity brought a change, and the law of Claudius was annulled by the sons of the Emperor Con-

[1] It is a curious instance of the variance of custom in this respect, that after it had in England become unusual for cousins of different sexes to kiss one another, the practice remained common in the simpler society of Scotland and still more in that of Ireland.

[2] Tac. *Ann.* xii. 5-7.

stantine. It was also by these sovereigns that marriage with a deceased wife's sister, or a deceased husband's brother, which had previously been lawful, though apparently regarded with social disapproval, was expressly forbidden.[1] This rule was adopted by Justinian, in whose *Codex* it finds a place.[2]

Besides the full lawful marriage of Roman citizens, to which alone the previous remarks have referred, there were two other recognized relations of the sexes under the Roman law.[3] One of these was the marriage of a citizen, whether male or female, with a non-citizen, *i. e.* a person who did not enjoy that part of citizenship which covered family rights and was called *connubium*. This was called a natural marriage (*matrimonium naturale, matrimonium iuris gentium*) as existing under the Law of Nature or Law of the Nations (*ius gentium*), as contradistinguished from the peculiar law of Rome (*ius civile*).[4] It was a perfectly legal union, and the children were legitimate: as of course were the children of two non-citizens who married according to their own law. When Roman citizenship became extended to all the subjects of the empire, the importance of this kind of marriage vanished, for it could thereafter have been applicable (with some few exceptions) only to persons outside the Empire, and marriages with such persons, who were *prima facie* enemies, were forbidden.

The other relation was that called concubinage (*concubinatus*). It was something to which we have no precise analogue in modern law, for, so far from being prohibited by the law, it was regulated thereby, being treated as a lawful connexion. It is almost a sort of unequal marriage (and is practically so described by some of

[1] Many other prohibitions of marriages applying to persons holding official relations, or to persons of widely different rank, or to cases where adoptive relationships come in, need not be mentioned, as they have no longer any great interest.

[2] *Cod. Theod.* iii. 12, 2 sqq.; *Cod. Iustin.* v. 5. 5 and 8.

[3] The connexion of two slaves, called *contubernium*, was not deemed a legal relation at all, and children born from it were not legitimate. So also a free person could not legally intermarry with a slave.

[4] See Essay XI, p. 570, in the Studies from which this chapter is taken.

the jurists) existing between persons of different station — the man of superior rank, the woman of a rank so much inferior that it is not to be presumed that his union with her was intended to be a marriage. It leaves the woman in the same station in which it found her, not raising her, as marriage normally does, to the husband's level. The children born in such a union are not legitimate; but they may require their father to support them, and are even allowed by Justinian, in one of his later enactments (*Novella* lxxxix), a qualified right of intestate succession to him. They of course follow their mother's condition, and they have a right of inheriting her property. Even here the monogamic principle holds good. A man who is married cannot have a concubine, nor can any man have more than one concubine at a time. Though regarded with less indulgence by the Christian emperors than it had been by their predecessors, it held its ground in the Eastern Empire, even under Justinian, who calls it a 'permitted connexion' (*licita consuetudo*), and was not abolished till long after his time by the Emperor Leo the Philosopher in A. D. 887. In the West it became by degrees discredited, yet doubtless had some influence on the practice of the clergy, the less strict of whom continued to maintain irregular matrimonial relations for a great while after celibacy had begun to be enforced by ecclesiastical authority.

Children born in concubinage may be legitimated by the subsequent marriage of their parents, according to a rule first introduced by Constantine, and subsequently enlarged and made permanent by Justinian (*Cod.* v. 27, 5 and 6; *Nov.* xii. 4; *Nov.* lxxxix. 8); a rule of great importance, which was long afterwards introduced into the Canon Law by Pope Alexander III in A. D. 1160, and has held its ground in the modern Roman law of continental Europe, as it does in the law of Scotland to this day. The bishops, prompted by the canonists, tried to introduce it in England, but were defeated by the opposition of the barons, who at the great council held at Merton in 20 Henry III (A. D. 1235-6) refused their consent in the famous words, 'We will not change the laws of England which hitherto have been used and ap-

proved.'[1] Nevertheless such power of legitimating the children of a couple born before their legal marriage seems to have been part of the ancient customs of England before the Conquest. The children were at the wedding placed under a cloak which was spread over the parents, and were from this called in Germany, France, and Normandy, 'mantle children.'[2]

I have already dwelt upon the most striking feature of the branch of legal history we have been tracing, the comparatively sudden passage from a system of extreme strictness — under which the wife's personality, with her whole right of property, became absolutely merged in that of her husband — to a system in which the two personalities remained quite distinct, united only by the rights which each had in matrimonial property, rights which were however not rights of joint-management, but exercisable (subject to limitations) by the husband alone so long as the marriage lasted, while the reversion was secured to the wife or her relatives. It is hardly less noteworthy that these two contrasted systems did for a considerable time exist side by side; and for a century, or perhaps more, must both have been in full vigour, though the freer system was obviously gaining ground upon the older and more stringent one.

Another fact, though more easily explicable, is also worth noting. In its earlier stages the Roman marriage bore a religious character, for we can hardly doubt that in primitive times Confarreation, the old patrician form with the sacrifice and the holy cake, was practically universal among the original citizens, before the *plebs* came into a separate and legally recognized existence. Hence perhaps it is that mar-

[1] 'Ad breve Regis de bastardia utrum aliquis natus ante matrimonium habere poterit hereditatem sicut ille qui natus est post. Responderunt omnes Episcopi quod nolunt nec possunt ad istud respondere, quia hoc esset contra communem formam Ecclesie. Ac rogaverunt omnes Episcopi Magnates ut consentirent quod nati ante matrimonium essunt legitimi sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam quia Ecclesia tales habet pro legitimis; et omnes comites et barones una voce responderunt quod nolunt leges Anglie mutare que usitatate sunt et approbate.' 20 Henr. III, *Stat. Mert.*

[2] Pollock and Maitland, vol. ii. p. 397. I have heard of the cloak custom as existing in Scotland down almost to our own time.

riage is described, even when that description had ceased to have the old meaning, as a 'sharing of all rights, both religious and secular.' In its middle period, which covers some five centuries, it was a purely civil relation, not affected, in its legal aspects, by any rules attributable to a theological or superstitious source. But when Christianity became the dominant faith of the Empire, the view which the Gospel and the usages as well as the teaching of the Church had instilled began thenceforward to influence legislation. These usages did not indeed, down till the eighth century, transform the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church. But they worked themselves into the doctrines of the Church in such wise that, in later days, they succeeded in making matrimony so far a sacred relation as to give it an indissoluble character, and not only restricted the circle of persons between whom it could lawfully be contracted, but abolished the power of terminating it by the mere will of the parties.

XI. *Marriage under the Canon Law*

When direct legislation by the State came to an end in Western Europe with the disappearance of the effective power of the Emperors in the fifth and sixth centuries, the control of marriage began to fall into the hands of the Church and remained there for many generations. To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit. It would be impossible within the limits of this Essay to describe that law, which is copious, and embarrassed by not a few controverted points. All that it seems necessary to say here is that the Canon Law, which was collected and codified in the thirteenth and fourteenth centuries, so far adhered to the established Roman doctrine as to recognize, down till the Council of Trent, the main principle that marriage requires nothing more than the free

consent of the parties, expressed in any way sufficient to show that the union which they contemplate is to be a permanent and lawful union. Marriage no doubt became, in the view of the mediaeval Church, as of the Roman Church to-day, a sacrament, but it is a sacrament which the parties can enter into without the aid of a priest. Their consent ought, no doubt, in the view of the Church and of Canon law, to be declared before the priest and to receive his benediction. It is only marriages 'in the face of the Church' that are deemed 'regular' marriages,[1] and the Fourth Lateran Council under Innocent the Third directed the publication of banns. But the irregular marriage is nevertheless perfectly valid. It is indissoluble (subject as hereinafter mentioned), and the children born in it are legitimate. A good ground for this indulgence may be found not only in Roman traditions, but also in the fact that the Church was anxious to keep people out of sin and to make children legitimate, so that it always presumed everything it could in favour of lawful matrimony.

This view prevailed, and may be said to have been the common law of Christendom, as it had been of the old Roman Empire, down till the Council of Trent.[2] That assembly, against the strong protests of some of its members, passed a decree (Sessio XXIV, cap. i, *De Reformatione Matrimonii*) which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless they took place in the presence of a priest and of two or three witnesses. Apparently it was not so much for the sake of securing the blessing of the Church upon every marriage as in order to prevent scandals which had arisen from the breach of a tie contracted in secret that the change, a grave and memorable change, was made. This great Council, which was intended to secure the union of Christendom under the See of Rome,

[1] See Lord Stowell's famous judgment in *Lindo* v. *Belisario* (*Consist. Cases*, p. 230), where he examines in an interesting way the requisites of marriage under the 'law of nature.'

[2] Canon VII of Session XXIV anathematizes those who deny the teaching of the Church that the adultery of one spouse does not dissolve the *vinculum matrimonii*, and Canon X those who deny that it is better and happier to remain in a state of virginity or celibacy.

really contributed to intensify the separatist forces then at work: and from it onwards one can no longer speak of a general marriage law even for Western Europe. Custom and legislation took thenceforward different courses, not only as between Protestant and Roman Catholic nations, but even as between different Protestant nations, there being no common ecclesiastical authority which Protestant States recognized. Thus the era of the Reformation is an era as marked in the history of marriage law as was the era of Constantine, when Christianity began to be dominant in the Roman Empire. And we shall see, when we return to the subject of divorce, that this is even more strikingly the case as regards the dissolubility of marriage than as regards the mode of contracting it.

Before passing on to sketch the legal history of the institution in England — since it is impossible to find space here for an account of its treatment in the laws of other European States — it is well to note what had been the general tendency of the customary law of the Middle Ages upon the character of the marriage relation.

One may sum up that tendency by saying that it had virtually expunged the free and simple marriage of the Romans under the later Republic and the Empire, and had substituted for it a system more closely resembling that of the religious marriage with Hand power of early Rome. The ceremony had practically become a religious one, though till the Council of Trent a religious service was not absolutely essential to its validity. The relation had become indissoluble, except by the decree of the Pope, who in this, as in some other respects, practically filled the place of the old Roman Pontifex, though of course both confarreation and the pontiff had been long forgotten.[1] It carried with it an absorption of the personality of the English wife into that of the husband, whereby all her property passed to him and she became subject to his authority and control. These conditions were the result partly of Teutonic custom,

[1] The pontifices had a certain oversight over the sacred marriage by *confarreatio*, and their action was needed to effect a *diffarreatio*, when it was desired to extinguish the *manus* of the husband over a divorced wife.

partly of the rudeness of life and manners; and such check as was imposed on them came from the traditions of the Roman law, and from the favour which the Canon law, much to its credit, showed to the wife. Of this favour some have found a trace in the phrase that occurs in the 'Form for the Solemnization of Matrimony' in the liturgy of the Church of England, where the bridegroom is required to say to the bride, 'with all my worldly goods I thee endow'; although, in point of fact, the law of England gives to the bride only a very limited (and now easily avoidable) right to one-third of the husband's real estate after his death.[1]

XII. *The English Law of Marriage*

The influence of the Roman system was, of course, less in England than in countries where, as in France and Italy, the Roman law had maintained itself in force, either as written law or as the basis of customary law. But now that we come to consider the course which the English law of marriage has taken, let us note that this law has flowed in two distinct channels down till our own time. So much of it as pertained to the marriage relation itself, that is to say, to the capacity for contracting marriage (including prohibited degrees), to the mode of contracting it, and to its dissolution, complete or partial, belonged to the canon or ecclesiastical law and was administered in the spiritual courts. So much of it as affected the property rights of the two parties (and especially rights to land) belonged to the common law and was administered in the temporal courts. This division, to which there is nothing parallel in the classical Roman law, was of course due to the fact that mediaeval Christianity, regarding marriage as a sacrament, placed it under the control of the Church and her tribunals in those aspects which were deemed to affect the spiritual well-being of the parties

[1] Others think that this expression, which would seem to refer not to real property but to chattels, is a relic of ancient Teutonic custom. As is observed by Messrs. Pollock and Maitland (*History of English Law*, vol. ii. p. 401), we must not assume that, from the days of savagery down to our own, all changes have been in favour of women. They had apparently more power over their own property in Anglo-Saxon times than in the thirteenth century.

to it. Nevertheless the line of demarcation between the two sides was not always, and indeed could hardly be, sharply or consistently drawn. The ecclesiastical courts had a certain jurisdiction as regards property. The civil courts were obliged, for the purposes of determining the right of a woman to dower and the rights of intestate succession, to decide whether or no a proper and valid marriage had been contracted. Their regular course apparently was to send the matter to the bishop's court, and act upon the judgment which it pronounced. But this was not always done. They often had to settle the question for themselves, applying, no doubt, as a rule the principles which the bishop's court would have followed, and (as has been explained by the latest and best of our English legal historians [1]) they often evaded the question of whether there had been a canonically valid marriage by finding that, as a matter of fact, the parties had been generally taken to have been duly wedded, and by proceeding to give effect to this finding.

The ecclesiastical lawyers were not successful in their treatment of such questions as fell within their sphere. The effort to base legal rules on moral and religious principles leads naturally to casuistry, and away from that common-sense view of human transactions and recognition of practical convenience which ought to be the basis of law. They multiplied canonical disabilities arising whether from pre-contract, a matter to which they gave a far greater importance than had previously belonged to it, or from relationship, either of consanguinity or of affinity; and they indeed multiplied these impediments to such an extent as to make the capacity of any two parties to enter into matrimony matter of doubt and uncertainty, giving wide opportunities for chicane, and an almost boundless scope for the interposition of the Roman Curia, whose sale of dispensations became a fertile and discreditable source of revenue. Their treatment of divorce will be presently examined. In their zeal to keep Christian people out of sin they recognized many clandestine unions as valid, though irregular, marriages,

[1] Messrs. Pollock and Maitland, in their admirable *History of English Law*, to which the reader curious in these matters may be referred.

while at the same time applying strict rules of evidence which practically withdrew much of the liberty that had been granted by the lax theory of what constituted a marriage. These tangled subtleties regarding pre-contracts and prohibited degrees were at the time of the Reformation swept away by a statute of 1540 (32 Henry VIII, c. 38), which declared that all marriages should be lawful which were 'not prohibited by Goddis lawe,' and that 'no reservation or prohibition, Goddis lawe except, shall trouble or impeche any marriage without the Levitical degrees.'

Two principles, however, remained unaffected by the legislation of this period in England. The one was the indissolubility of marriage, a topic to which I shall presently return. The other was the freedom of entering into it, consent, and consent alone, being still all that was necessary to make a marriage valid.[1] England, of course, did not recognize the decrees of Trent, so the old law continued in force after that Council, though motives like those which had guided the Council induced the ecclesiastical courts to lean strongly in favour of the almost universal practice of marrying before a clergyman, and to require in all other cases very strict evidence that a true consent, directed to the creation of lawful matrimony, had in fact been given. Moreover, where the marriage had been irregular, the spiritual courts might compel its celebration in the face of the Church. So things went on, with much uncertainty and some confusion between the act needed to constitute marriage and the evidence of that act, till the middle of the eighteenth century, when a statute was passed in A. D. 1753 (26 Geo. II, c. 33) which required all marriages to be celebrated by a clergyman and in a church (unless by dispensation from the Archbishop of Canterbury), and prescribed other formalities.[2] These provisions remained in force (except as to Jews and Quakers)

[1] The House of Lords was equally divided upon this point in the case of *Reg.* v. *Millis*, in 1843: but historical inquiry tends to confirm the view of Lord Stowell, that the presence of a clergyman was not essential (see *Dalrymple* v. *Dalrymple*, 2 Haggard, p. 54).

[2] The English Dissenters soon began to complain of this Act, as they were thenceforth (until 1836) obliged to be married in church. Charles James Fox used to denounce the Act as 'contrary to the Law of Nature.'

until 1836, when a purely civil marriage before a Registrar was permitted as an alternative to the ecclesiastical ceremony.[1] During the Commonwealth marriages had been contracted before justices of the peace, but the Restoration legislation, while validating the marriages so formed, abolished the practice. The old law remained in Ireland, and that was how the question what kind of marriage ceremony was required by the common law came before the House of Lords in the famous case of *Reg.* v. *Millis*, which was an Irish appeal, and the decision in which, declaring that by the common law the presence of a clergyman was required to make a marriage valid, seems to have been erroneous.

XIII. *Property Relations of the Consorts under English Law*

Now let us turn to the effect of marriage in the law of England upon the property and the personal rights of the wife.

That effect has generally been described as making the two consorts one person in the law. Such they certainly were for some purposes under the older Common Law of England. The husband has the sole management of all the property which the wife had when married, or which she subsequently received or earned by her exertions. In acquiring all her property he becomes also liable for the debts which she owed before marriage, but after marriage he has not to answer for any contract of hers, because her agreements do not bind him except for necessaries. He is, moreover, liable for wrongs done by her. He cannot grant anything to her, or covenant with her; and if there was any contract between him and her before marriage, it disappears by her absorption into his personality. She can bring no action without joining him as plaintiff, nor can she be sued

[1] A civil marriage is not, however, compulsory in England as it is in France and some other continental countries. In Scotland it has now become fashionable for Presbyterians to be wedded in church, but the Scottish law, as every one knows, does not prescribe either a clergyman or a registrar.

without joining him as defendant. She cannot give evidence for or against him (save where the offence is against herself); and if she commit a crime (other than treason or murder) along with him, she goes unpunished (though for crimes committed apart from him she may be prosecuted), on the hypothesis that she did it under his compulsion. So in a case, in the thirteenth century, where husband and wife had produced a forged charter, the husband was hanged and the wife went free, 'because she was under the rod of her husband' (*quia fuit sub virga viri sui*[1]).

But this theory of unity is not so consistently maintained as was the similar theory of the Romans regarding the marriage with Hand power. For the wife's consent to legal acts may be effectively given where she has been separately examined by the Court to ascertain that her consent is free; and even the fact that she must be joined in legal proceedings taken by or against her shows that she has a personality of her own, whereas under the Roman *manus* she was wholly sunk in that of her husband. Thus it is better not to attempt to explain the wife's position as the result of any one principle, but rather to regard it as a compromise between the three notions of absorption, of a sort of guardianship, and of a kind of partnership of property in which the husband's voice normally prevails.

As respects her personal safety, she was better off than the Roman wife of early days, for the husband could punish the latter apparently even with death, after holding a domestic council, whereas the English husband could do no more than administer chastisement, and that only to a moderate extent. The marital right of chastisement seems to have been an incident to marriage in many rude societies. A traveller among the native tribes of Siberia relates that he found a leather whip usually hung to the head of the conjugal bed, almost as a sort of sacred symbol of matrimony; and he was told that the wife complained if her husband did not from time to time use the implement, regarding his neglect to do so as a sign of declining affection. And it would seem

[1] Pollock and Maitland, vol. ii. ch. vii. p. 404 (quoting Bracton, 429 b).

that this notion remains among the peasantry of European Russia to this day.[1]

Everybody has heard of the odd habit of selling a wife which still occasionally recurs among the humbler classes in England; and most people suppose that it descends from a time when the Teutonic husband could sell his consort, as a Roman one apparently could in the days of Hand power. There is, however, no trace at all in our law of any such right,[2] though a case is reported to have arisen in A. D. 1302, when a husband granted his wife by deed to another man, with whom she thereafter lived in adultery.[3]

The compensation given to the English wife for the loss (or suspension during the marriage) of her control over her property is to be found in her right of Dower, that is, of taking on her husband's death one-third of such lands as he was seised of, not merely at his death, but at any time during the marriage, and which any issue of the marriage might have inherited. As this right interfered with the husband's power of freely disposing of his own land, the lawyers set about to find means of evading it, and found these partly in legal processes by which the wife, her consent being ascertained by the courts, parted with her right, partly by an ingenious device whereby lands could be conveyed to a husband without the right of dower attaching to them, partly by giving the wife a so-called jointure which barred her claim. The wife has also a right, which of course the husband can by will exclude, of succeeding in case of intestacy to one-third of his personal property, or, if he leave no issue, to one-half.

This state of things hardly justifies the sleek optimism of Blackstone, who closes his account of the wife's position by observing, 'even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of

[1] Kovalevsky, *Modern Customs and Ancient Laws of Russia*, p. 44.

[2] My friend Mr. F. W. Maitland, whose authority on these matters is unsurpassed, informs me that he knows of no such trace. The practice, however, seems to have been not uncommon. Several instances of the sale of a wife by auction, sometimes along with a child, are reported from Kent between 1811 and 1820.

[3] See Pollock and Maitland, vol. ii. p. 395.

England.' The Romans, although they allowed to women a fuller independence, were more candid when they said: 'In many points of our law the condition of the female sex is worse than that of the male.'

XIV. *Gradual Amendment of the English Matrimonial Law*

However, the Courts of Equity ultimately set themselves in England to improve the wife's condition. They recognized some contracts and grants between husband and wife. They allowed property to be given to trustees for the sole and separate use of a wife; and if it was given to her with an obvious intent that it should be for her exclusive benefit, they held the husband, in whom by operation of the general law it would vest, to be a trustee for the wife. When during marriage there came to a wife by will or descent any property of which the husband could obtain possession only by the help of a Court of Equity, they required him to settle a reasonable part of it upon the wife for her separate use. And in respect of her separate property, they furthermore permitted the wife to sue her husband, or to be sued by him. While these changes were in progress, there had grown up among the wealthier classes the habit of making settlements on marriage which secured to the wife, through the instrumentality of trustees, separate property for her sole use, and wherever a woman was a ward of Court, the Court insisted, in giving its consent to the marriage, that such a settlement should be made for her benefit.

By these steps a change had been effected in the legal position of women as regards property similar to, though far more gradual, and in its results falling far short of, the change made at Rome when the marriage without Hand power became general. But in England a recourse to the Courts has always been the luxury of the rich; and as the middle and poorer classes were not wont to go to the Courts, or to make settlements, it was only among the richer classes that the wife's separate estate can be said to have existed. At last, however, the gross injustice of allowing a selfish or wasteful husband to seize his wife's earnings and neglect her

was so far felt that several Acts were passed (the first in 1857), under which a woman deserted by her husband may obtain from a magistrate a judicial order, protecting from him any property she may acquire after desertion. By this time an agitation had begun to secure wider rights for married women. It had great difficulties to overcome in the conservative sentiment of lawyers, and of those who are led by lawyers, and more especially of members of the House of Lords. Not till 1870 did the British Parliament take the step which the Romans had taken long before the Christian era, and which many American States had taken in the first half of the nineteenth century. A statute of that year, amended and extended by others of 1874 and 1882, swept away the old rule which carried all the wife's property over to the husband by the mere fact of marriage; so that now whatever a woman possesses at her marriage, or receives after it, or earns for herself, remains her own as if she were unmarried, while of course the husband no longer becomes liable by marriage to her ante-nuptial debts. By these slow degrees has the English wife risen at last to the level of the Roman. The practice of making settlements on marriage still remains, especially where the wife's property is large, or where there is any reason to distrust the bridegroom; for though the interposition of trustees is no longer needed to keep the property from falling by operation of law into the husband's grasp, he may still press or persuade her to part with it, since she now enjoys full disposing power, and if she does part with it, she and the children may suffer. Thus custom sustains in England, and perhaps will long sustain, a system resembling that of the Roman *Dos*. Yet the number of persons possessing some property who marry without a settlement increases, as does the number of women whose strength of will and knowledge of business enables them to hold their own against marital coaxing or coercion.

It need hardly be said that the personal liberty of the wife was established long before her right to separate property. Says Blackstone (writing in 1763): —

'The husband by the old law might give his wife moderate correction. For as he is to answer for her misbehaviour, the

law thought it reasonable to entrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet.* But in the politer reign of Charles the Second this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the Courts of Law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour.'[1]

'This touching attachment to their old common law still survives among 'the lower rank of people' in the form of wife beating. But among the politer classes the right to restrain a consort's liberty (except under very special circumstances) may be deemed to have become exploded since the case of *Reg.* v. *Jackson* in 1891.[2] So that now the English wife, like the Roman, may quit her husband's house when she pleases, and the suit for restitution of conjugal rights, whereby either could compel the other to live in the common household, is falling into disuse, if indeed it can still be described as in any sense effective since the Act, passed in 1884, which took away the remedy by attachment. . . .

The interest which belongs to these changes in the law, changes generally similar in their result in the English and in the Roman systems, though far more gradually made in the former than in the latter, is the interest of observing the methods whereby custom and legislation have sought to

[1] Blackstone, *Commentaries*, vol. i. bk. i. chap. 15.

[2] 1 Q. B. p. 671 (in the Court of Appeal). The judgments are instructive. The Master of the Rolls goes so far as to doubt whether the husband ever had a legal power of correction, a curious instance of the way in which the sentiment of a later time sometimes tries to force upon the language of an older time a non-natural meaning, the new sentiment being one which the older time would have failed to understand. It would have been simpler to admit that what may well have been law in the seventeenth century is not to be taken to be law now, manners and ideas having so completely changed as to render the old rules obsolete.

work out different possible theories of the marriage relation. There are usually said to be two theories, that of Mastery, and that of Equality. On the former the husband is lord of the wife's property as well as of her person. The law puts her at his mercy, trusting that affection, public opinion, and a regard for domestic comfort will restrain the exercise of his rights. On the other theory, each consort is a law to him- or herself, each can dispose of his or her property, time, and local presence without the assent of the other. The law allows this freedom in the hope that affection, respect, and the opinion of society will prevent its abuse. Yet these two theories, that with which both Rome and England began, that with which both Rome and England have ended, do not exhaust the possibilities of the relation. For there is a third theory which, more or less consciously felt to be present, has influenced both the one and the other, creating a sort of compromise between them. It is the theory of a partnership in social life and in property similar to the partnership which necessarily exists as regards the children of a marriage. This idea is expressed by the form which the Mastery theory took when it declared husband and wife to be 'one person in the law,' and in the Anglican marriage service where the wife's promise to obey [1] is met by the husband's declaration that he endows her with all his worldly goods. It also qualifies the theory of Equality and Independence by the practice of creating a settlement in England, and a *Dos* (and *Donatio propter nuptias*) at Rome, in which each of the married pair has an interest.

Any one can see that the Mastery theory, against which modern sentiment revolts, was more defensible in a time of violence, when protection for life and property had to be secured by physical force as well as by recourse to the law, than it is to-day. Any one can also see that there are even to-day households for which the Mastery theory may be well suited, as there also are, and always have been, even in days of rudeness and in Musulman countries, other households

[1] This promise does not appear in the forms of marriage service commonly used by the unestablished churches of England, or most of them.

where the wife was, and rightly was, the real head of the family. Those moreover who, judging of other times by their own, think that the position of the wife and of women generally must have been, under the Mastery theory, an intolerable one, need to be reminded not only that the practical working of family life depends very largely on the respective characters of the persons within the family, and on the amount of affection they entertain for one another, but also that it is profoundly modified by the conception of their relations which rules the minds of these persons. Law, itself the product and the index of public opinion, moulds and solidifies that conception, and the wife of the old stern days of marital tyranny saw no indignity or hardship in that position of humble obedience which the independent spirit of our own time resents.

XV. *Divorce under the Canon Law*

There is one more point in which opposite theories of marriage have to be contrasted, and in which the contrast appears most strikingly. This is the point which touches the permanence of the relation.

We have already seen what were the provisions of the Roman law upon the subject of Divorce. Those provisions continued to prevail in Western Europe after the fall of the Empire, until, apparently in the eighth, ninth, and tenth centuries, new rules enforced by the Church superseded them in the regions where the imperial law had been observed. A similar change occurred later in other countries such as England and Germany, where the ancient customs of the barbarian tribes had allowed the husband, and apparently in some cases the wife also, to dissolve the marriage and depart. From the twelfth century onwards the ecclesiastical rules and courts had undoubted control of this branch of law all over Christian Europe. Now the Church held marriage to be a sacrament and to be indissoluble. Divorce, therefore, in the proper sense of the term, as a complete severance of a duly constituted matrimonial tie, was held by the Church inadmissible. This view was based on the teaching of our

Lord as given in the Gospels,[1] and was enforced on every bridal pair in the liturgical form employed at marriage, as indeed it is in the English liturgy to-day. Nevertheless, the Church recognized two legal processes which were popularly, though incorrectly, called divorces.

One of these, called the divorce from the bond of marriage (*a vinculo matrimonii*), was in reality a declaration by ecclesiastical authority — that of the Pope, or a deputy acting under him — that the marriage had been null from the beginning on the ground of some canonical impediment, such as relationship or pre-contract. As already observed, the rules regarding impediments were so numerous and so intricate that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. The practice of granting divorces of this class, which was constantly made a means of obliging the great ones of the earth and augmenting papal revenues, may sometimes have been really useful for the purpose of dissolving the ill-assorted unions of those who could secure a decree from the ecclesiastical authorities. Technically, however, it was not a dissolution of marriage, but a declaration that no marriage had ever existed, and therefore it rendered children born in the relation illegitimate.[2]

The other kind of divorce was that called 'from board and bed' (*a mensa et thoro*). It was a regular part of the jurisdiction of the Church Courts, and effected a legal separation of the two parties from their joint life in one household, while leaving them still man and wife, and therefore unable to marry any other person. The status of the children was of course not affected.

XVI. *The Later Law of Divorce in England and Scotland*

This law prevailed over all Europe till the Reformation, and continued to prevail in all Roman Catholic countries

[1] Messrs. Pollock and Maitland refer to the dooms of Aethelbert as showing the permissibility of divorce in early English law (*History of English Law*, vol. ii. p. 390).

[2] But canonical ingenuity discovered methods by which in some cases the legitimacy of the children might be saved though the marriage was declared void.

till a very recent time. In some it still prevails, at least so far as Roman Catholics are concerned. But in most Protestant countries it received a fatal shock from the denial, in which all Protestants agreed, of the sacramental character of marriage, and from the revival, in some of such countries, of the view of marriage as a purely civil contract. Thus in Scotland the courts began, very soon after the Roman connexion had been repudiated, to grant divorces; and in A. D. 1573 a statute added desertion to adultery as a ground for divorce. In England, however, where the revulsion against the doctrines of mediaeval Christianity was less pronounced, and where the Ecclesiastical Courts retained their jurisdiction in matrimonial causes, the old law went on unchanged, save that after the abolition of many of the canonical impediments, mentioned above, divorces *a vinculo*, declaring marriages to have been originally invalid, became far more rare. Nevertheless, attempts had been made by some of the more energetic English Reformers to assert the dissolubility of marriage. A draft ecclesiastical code (called the *Reformatio legum ecclesiasticarum*) was prepared, but never enacted; and Milton argued strongly on the same side in his well-known but little read book. About his time cases begin to occur in which marriages were dissolved by Acts of Parliament; a practice which became more frequent under the Whig régime of the early Hanoverian kings, and ultimately ripened into a regular procedure by which those who could afford the expense might secure divorces. The party seeking divorce was required to first obtain from the Ecclesiastical Court a divorce *a mensa et thoro*, which obtained, he introduced his private Bill for a complete divorce. It was heard by the House of Lords as a practically judicial matter, in which evidence was given, and counsel argued the case for and (if the other party resisted) against the divorce. It was usually by the husband that these divorce Bills were promoted, and indeed no wife so obtained a divorce till A. D. 1801.[1]

[1] There had also sprung up the practice of effecting private separations between a husband and a wife by means of a deed executed by each of them, and such a deed presently came to be recognized as a defence to a suit by either party for the restitution of conjugal rights.

This characteristically English evasion of that principle of indissolubility for which such immense respect was professed lasted till 1857, long before which time the existence of a law which gave to the rich what it refused to the poor had become a scandal.[1] In that year an Act was passed, not without strenuous opposition from those who clung to the older ecclesiastical theory, which established a new Court for Divorce and Matrimonial causes, empowered to grant either a complete dissolution of marriage (divorce *a vinculo matrimonii*) or a 'judicial separation' (divorce *a mensa et thoro*). This statute adhered to the rule which the practice of the House of Lords had established, and under it a husband may obtain a divorce on proof of the wife's infidelity, whereas the wife can obtain it only by proving, in addition to the fact of infidelity on the husband's part, either that it was aggravated by bigamy or incest, or that it was accompanied by cruelty or by two years' desertion. To prevent collusion a public functionary called the Queen's Proctor is permitted to intervene where he sees grounds for doing so. Misconduct by the husband operates as a bar to his obtaining a divorce. Thus the law of England stands to-day. Attempts have been made to alter it on the basis of equality, so that whatever misconduct on the wife's part entitles a husband to divorce shall, if committed by the husband, entitle her likewise to have the marriage dissolved. But these attempts have not so far succeeded.[2]

The law of Scotland is more indulgent, and not only permits a wife to obtain divorce for a husband's infidelity alone, but also recognizes wilful desertion for four years as a ground for divorce. In other respects its provisions are generally similar to those of the English law. Ireland, however, remains under the old pre-Reformation system. There

[1] Probably the English Jews were permitted to exercise in the seventeenth and eighteenth centuries the right of divorce which their own law gave them. But in those days the Jews were so cut off from the general English society that the phenomenon passed almost unnoticed. They were a very small community, living practically under their personal law, as the Parsis do in Western India to-day.

[2] The Act of 1857 (amended in some points by subsequent statutes) contains provisions intended to prevent collusion between the parties, and empowers the Court to regulate the property rights of the divorced persons and the custody of the children (if any) of the marriage.

is no Divorce Court, and no marriage can be dissolved save by Act of Parliament. The bulk of the people are Roman Catholics, and among Protestants as well as Roman Catholics the level of public sentiment and of conjugal morality has apparently been higher than in England, nor have attempts been made, at any rate in recent years, to obtain the freedom which England and Scotland possess. The United Kingdom thus shows within its narrow limits the curious phenomenon of three dissimilar systems of law regulating a matter on which it is eminently desirable that the law should be uniform. England has a comparatively strict rule, and one which is unequal as between the two parties. Scotland is somewhat laxer, but treats both parties alike. Ireland has no divorce at all. So little do theoretical considerations prevail against the attachment of a nation to its own sentiments and usages.

I reserve comments on these systems till we have followed out the history of the English matrimonial law in the widest and most remarkable field of its development, the United States of America.

XVII. *The Divorce Laws of the United States*

When the thirteen Colonies proclaimed their separation from Great Britain in 1776, they started with the Common Law and all such statute law as had in fact been in force at the date of the separation. Accordingly they had no provision for dissolving marriages, nor any Ecclesiastical Courts to grant dissolutions, seeing that such tribunals had never existed in America, where there had been no bishops. Presently, however, they began to legislate on the subject, and the legislation which they, and the newer States added to the Union since 1789, have produced presents the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing communities have ever tried. Both marriage and divorce belong, under the American Constitution, to the several States, Congress having no right to pass any laws upon the subject, except of course for the District of

Columbia and the Territories. Thus every one of the (now) forty-five States has been free to deal with this incomparably difficult and delicate matter at its own sweet will, and the variety of provisions is endless. As it would require a great deal of space to present these in detail, I shall touch on only some salient points.

Originally, the few divorces that were granted were obtained, following the example of England, by means of Acts of the State legislature. The evils of this plan were perceived, and now nearly all the States have by their Constitutions forbidden the legislature to pass such Acts, since Courts have been provided to which application may be made. These are usually either the ordinary inferior Courts of the State, or the Chancery Courts (where such survive). No State seems to have, like England, erected a special Court for the purpose. One State only, South Carolina, does not recognize divorce at all. In 1872, under the so-called 'carpet-bagger government,' set up after the War of Secession, a statute was passed in that State authorizing divorces for infidelity or desertion, but in 1878, when the native whites had regained control, this statute was repealed, so that now, if a divorce is obtained at all, it must be obtained from the legislature outside the regular law. South Carolina has the distinction of being to-day probably the only Protestant community in the world which continues to hold marriage indissoluble. No State has fewer Roman Catholic citizens: Presbyterians and Methodists are the strongest religious bodies.

The causes for which divorce may be granted range downwards from the strictness of such a conservative State as New York, where conjugal infidelity is the sole cause recognized for an absolute dissolution of the marriage, to the laxity of Washington, where the Court may grant divorce 'for any cause deemed by it sufficient, and when it shall be satisfied that the parties can no longer live together.' Desertion is in nearly all States recognized as a ground for dissolution. So is cruelty by either party, or the reasonable apprehension of it by either. So in many States the neglect of the husband to provide for the wife, habitual intemper-

ance, indignities or insulting treatment, violent temper, and (in a smaller number) the persistent neglect of her domestic duties by the wife, grave misconduct before marriage unknown to the other party, insanity, an indictment for felony followed by flight, vagrancy, are, or have been, prescribed as among the sufficient grounds for divorce. In some States a sentence of imprisonment for life *ipso iure* annuls the marriage of the prisoner, permitting the other partner to remarry, and, in most, conviction for felony or infamous crime is a ground on which the Court may decree, and presumably will decree, the extinction of the marriage. Moreover, there are still a few States where over and above the judicial process open to a discontented consort, the State legislature continues to grant divorces by special statutes. Delaware is, or very recently was, such a State; and in the twenty years preceding 1887 it would seem that four-fifths of its divorces, not indeed very numerous (289 for twenty years), were so obtained. The laws of most States also provide for what the Americans call a 'limited divorce,' and the English a 'judicial separation,' equivalent to the old divorce *a mensa et thoro*. It leaves the marriage still valid, but relieves the parties from any obligation to live together; and in some States the Court in pronouncing a decree of divorce may change the name of the wife (in Texas and Arizona the name of either party), while in Vermont it may also change the names of the children who are minors.

Not less remarkable than the multiplication of grounds for divorce in the American States is the extreme laxity of procedure which has grown up. The Courts having jurisdiction are usually the Courts of the county, tribunals of no great weight, whose ill-paid judges are seldom men of professional eminence. The terms of residence within a State which are required before a petitioner can apply for a divorce are generally very short. The provisions for serving notice on the respondent or defendant to the divorce suit are loose and seem to be carelessly enforced. Some States allow service to be effected by publication in the newspapers, if the other party be not found within the State, and this of course often happens when the applicant has recently

come to the State, most likely a distant one, from that in which he or she lived with the other consort. Frequently he comes for the express purpose of getting his marriage dissolved. Although most States declare collusion or connivance by the other party to be a bar to the granting of a divorce, and some few States provide that a public official shall appear to defend in undefended petitions, the provisions made for detecting these devices are inadequate; and in not a few cases the proceedings do little more than set a judicial seal upon that voluntary dissolution by the agreement of the two consorts, which was so common at Rome. It is doubtless a point of difference between the Roman law and that of modern American States that in the former the parties could by their own will and act terminate the marriage: in the latter the Courts must be invoked to do so. But where the Courts out of good-nature or carelessness made a practice of complying with the application of one party, unresisted or feebly resisted by the other, this difference almost disappears. The facilities which some of the more lax States hold out to those who come to live in them for the requisite period, and who then procure from the complaisant Court a divorce without the knowledge of the other consort, constitute a grave blot on the administration of justice in the Union generally, for a marriage dissolved in one State (where jurisdiction over the parties has been duly created) is *prima facie* dissolved everywhere;[1] and although the decree might conceivably be reversed if evidence could be given that it had been improperly obtained, it is usually so difficult to obtain that evidence that the injured party, especially an injured wife, must perforce submit.

. . . . . .

XXIV. *Some General Reflections: Changes in Theory and in Sentiment regarding Marriage*

A few words more to sum up the general result of our survey. We have seen that the relations of the wife to the

[1] In two or three States the law provides that when an inhabitant goes into some other State for the purpose of getting a divorce for a cause arising within the State, or for a cause which the law of the

husband have been regulated sometimes by one, sometimes by the other of two systems, which have been called those of Subordination and Equality.[1] In all countries custom and law begin with the system of Subordination. In some, the wife is little better than a slave. Even at Rome, though she was not only free but respected, her legal capacity was merged in her husband's.

This system vanishes from Rome during the last two centuries of the Republic, and when the law of Rome comes to prevail over the whole civilized world, the system of Equality (except so far as varied by local custom) prevails over that world till the Empire itself perishes.

In the Dark Ages the principle of the subordination of the wife is again the rule everywhere, though the forms it takes vary, and it is more complete in some countries than in others. It was the rule among the Celtic and Teutonic peoples before they were Christianized. It finds its way, through customs conformable to the rudeness of the times, into the law of those countries which, like Italy, Spain, and France, were only partially Teutonized, and retained forms of Latin speech. It holds its ground in England till our own time, though latterly much modified by the process which we call the emancipation of women, a process which, under the influence of democratic ideas, has moved most swiftly and has gone furthest among the English race in North America. But in our own time the principle of equality has, in most civilized countries, triumphed all along the line, and so far as we can foresee, has definitely triumphed. One must imagine a complete revolution in ideas and in social habits in order to imagine a return to the system of Subordination as it stood two centuries ago.

As there have been two systems determining the relations

State would not authorize, a divorce granted to him shall have no effect within the State.

[1] By Equality I do not mean any recognition of Identity or even Similarity as respects capacity and practical work (though the tendency is in that direction), but the equal possession of private civil rights and the admission of an individuality entitled to equal respect and an equally free play of action. Such Equality is perfectly compatible, given sufficient affection, with a complete identification of the consorts in the harmony which comes of the union of diverse but complementary elements.

of husband and wife in respect of property and of personal control, so also have there been throughout all history two aspects of the institution of marriage, one in which the sensual and material element has predominated, the other in which the spiritual and religious element has come in to give a higher and refining character to the relation. In this case, however, it is not possible to make the relative importance of these two aspects synchronize with the general progress of civilization, nor even with the elevation of the position of women. It is true that among barbarous and some semi-civilized races the physical side of the institution is almost solely regarded, and that we may suppose a remote age when primitive man was in this respect not much above the level of other animals. But there have been epochs when civilization was advancing while the moral conception of marriage, or at any rate the popular view of marriage as a social relation, was declining. The tie between husband and wife in the earlier days of Rome was not only closer but more worthy and wholesome in its influence on the lives of both than it had become in the age of Augustus. Christianity not only restored to the tie its religious colour, but in dignifying the individual soul by proclaiming its immortality and its possibility of union with God through Christ gave a new and higher significance to life as a whole, and to the duties which spring from marriage. The greatest advance which the Christian world made upon the pagan world was in the view of personal purity for both sexes which the New Testament inculcated, a view absent from the Greek and Italian religions and from Greek and Latin literature, though there had been germs of it in the East, where habits of sensual indulgence more degrading than those of the West were opposed by theories of asceticism, which passed into and tinged primitive and mediaeval Christianity.

The more ennobling view of love and of the marriage relation held its ground through the Middle Ages. There was plenty of profligacy — as indeed the ideal and the actual have never been more disjoined than in the Middle Ages. But in spite of profligacy on the one hand, and the glorification of celibacy on the other, and notwithstanding the

subjection of women in the matter of property and even of personal freedom, the conception of wedded life as recognized by the law of the Church and enshrined in poetry remained pure and lofty. That the Reformation took away part of the religious halo which had surrounded matrimony may be admitted. Whether this involved a practical loss is a difficult question. It may be that, in their anxiety to be rid of what they deemed superstition, and in their disgust at the tricky and mercenary way in which ecclesiastical lawyers had played fast and loose with the intricate rules of canonical impediment, the Reformers of Germany, Scandinavia, and Scotland forgot to dwell sufficiently on the fact that though marriage is a civil relation in point of form and legal effect, it ought to be, to Christians, essentially also a religious relation, the true consecration of which lies not in the ceremonial blessing of the Church, but in the solemnity of the responsibilities it involves. Yet it is not clear that, in point of domestic happiness or domestic purity, the nations which have clung to the mediaeval doctrine stood a century ago, or stand now, above those which had renounced it. General theories regarding the influence of particular forms of religion, like theories regarding the influence of race, are apt to be misleading, because many other conditions have to be regarded as well as those on which the theorist is inclined to dwell.

Whoever regards the doctrines of the Roman Catholic Church respecting marriage and realizes her power over her members will expect to find a higher level of sexual morality in Roman Catholic countries than he will in fact find. So on the other hand will he be disappointed who accepts that view of the superiority in social virtues of peoples of Teutonic stock which finds so much favour among those peoples, for dissolutions of the marriage tie have latterly grown more frequent than they formerly were among Protestant and Teutonic nations, and are apparently less condemned by public opinion than was the case in older days.

The material progress of the world, the mastery of man over nature through a knowledge of her laws, the diffusion of knowledge and of the opportunities for acquiring it, are

themes which ceaselessly employ the tongues of speakers and the pens of journalists, while they swell with pride the heart of the ordinary citizen. But they are not the things upon which the moral advancement of mankind or the happiness of individuals chiefly turns. They co-exist, as the statistics of recent years show, with an increase, over all or nearly all civilized countries, of lunacy, of suicide, and of divorce.

INDEX TO VOLUMES I-III[1]

Abridgements of Year-books, II. 112
Accident, I. 223
Account, action of, III. 295, 311; and third person beneficiary, III. 343-351
Accursius, Francis, I. 649
Administration of states, ecclesiastical jurisdiction over, II. 303-310; equity jurisdiction over, II. 308-310
Admiral, first mention of, I. 304
Admiralty, court of, I. 304-326, 534; jurisdiction of, I. 308-326; jurisdiction, in English Colonies, I. 454; Courts, Reports of, III. 154; jurisdiction, history of, II. 312-364
Adoption of common law, I. 425
Advowson, III. 607-608
Aethelbert of Kent, I. 18; laws of, II. 9
Aethelred, laws of, II. 11
Aethelstan, laws of, II. 11
Agency, history of, III. 368-414; and the law of partnership, III. 187 and tortious responsibility, III. 520-537
Agistor's lien, III. 290
Agricultural holdings acts, III. 701-702
Alaric, law of, I. 15, 22
Alfred, code of, II. 10
Alien merchants, III. 18, 78
Aliens and mixed jury, I. 303
Amendment of pleas, II. 628
American Colonies, English law in, I. 367-463; sources of law of, II. 164-168; courts of chancery in, II. 779-809
Anglo-Norman law, II. 20-40
Anglo-Saxon law, I. 88-107; sources of, II. 1-20; material for history of, II. 62-68; of slander, III. 449; testamentary dispositions in, III. 751
Animals, harm done by, III. 489-495; liability for, III. 512-516

[1] Prepared by Professor Ernst Freund, of the Editorial Committee.

Appeal, from Colonies to England, I. 439; of felony, II. 405-427, 479; of robbery, III. 418-422
Appellate jurisdiction, I. 522-523
Archdeacon, court of, II. 275
Archdeaconries, I. 256
Arches, court of, I. 274; II. 277
Arms, assize of, II. 445
Arrest, law of, II. 452
Articuli Cleri, I. 272; II. 262
Arundel, Earl of, I. 640
Assizes, of Henry II., II. 25, 72; Book of, II. 109, 215
Assumpsit, history of, III. 259-303, 325-328
Assumption of risk, doctrine of, I. 779
Attachment, process of, in admiralty, II. 350
Attorney and law of agency, III. 395-397
Attornment, III. 603
Attwood, Chief Justice, I. 384, 393
Audience, court of, II. 277
Azo, I. 644

Bacon, Lord, I. 696-698; plans for revising statute law, II. 169-170
Bail, II. 472-479
Bailment, analogy to uses, II. 743
Bankruptcy, I. 543-548
Banks, early in America, III. 247
Barbarorum Leges, I. 19-20, 34-40, 64; and slander, III. 448; and tort responsibility, III. 484-485
Barcelona, ordinances of, III. 53, 106
Bargain and Sale, II. 744
Barnardiston, Reporter, II. 126
Battle, trial by, I. 94, 116; II. 396-402, 480
Bearer clauses in negotiable instruments, III. 62-65
Becket, I. 636
Bedford Levels, registration system for, I. 487
Beneficiaries, action in assumpsit, III. 339-367
Beneficium inventorii, I. 220
Benefit of clergy, II. 289
Bentham, Jeremy, I. 353, 492-515, 716, 720-722; II. 645-649; and law of evidence, II. 697
Bereford, William, I. 653
"Best evidence" rule, II. 695
Betrothal, in Roman law, III. 792-793
Bill, proceeding by, in chancery, II. 237
Bills of Exchange, in common law courts, 1. 304, III. 17, 51; and the law merchant, I. 329-330
Black book of the admiralty, I. 232, 306; II. 326

Blackburn, Judge, I. 771-775
Blackstone, Commentaries, I. 204, 715; II. 49; and law of evidence, II. 695
Body of Liberties, Massachusetts, I. 873
Bologna, Law School of, I. 590
Bookland, I. 106
Boroughs, III. 162; law of intestacy in, III. 729-736
Bottomry, I. 243; bonds, III. 103
Bowen, Lord, I. 817-824
Bracton, I. 165, 643; II. 35; Treatise on Laws of England. II. 83
Bramwell, Judge, I. 778-785
Breviarium Alarici, I. 15, 346; II. 156
Bridgeman, Orlando, I. 700
Bristol, Red book of, I. 292; staple of, III. 26
Britton, I. 659; II. 37; Law Treatise, II. 84
Brougham, Lord, I. 723
Bulstrode, Reporter, II. 125
Burchard of Worms, I. 254
Burgundionum Lex Romana, I. 15, 346; II. 156
Burnel, Robert, Chancellor, I. 649
Burrow's Reports, II. 143-145
Business companies, in Colonies, III. 243-248
Business corporations, history of, III. 195-235; in U. S. III. 234
By-laws of corporations, III. 213-215
Byron, Sir John, I. 663

Caesar, Sir Julius, I. 202
Cairns, Lord, I. 789-796
Calais, staple of, III. 25
Camden, Lord Chancellor, I. 715
Campbell, Lord, I. 725, 739, 743
Canon Law, I. 46-47, 175, 248-288; degrees at universities, I. 275; II. 257; in England, II. 74-76, 269
Capias excommunicatum, I. 271
Capital punishment, I. 550-551
Capitula Itineris of Richard I., II. 25
Capitularies, I. 23, 40-42
Caracalla, unification of law through grant of citizenship, I. 586
Carolina, North and South, early law in, I. 407-410
Carrier, liability of, III. 148-160
Carta Mercatoria, I. 301
Cases Cited
Acton *v.* Blundell, I. 213
Ashford *v.* Thornton, II. 401, 484
Blankard *v.* Galdy, I. 419
Bligh *v.* Brent, III. 218

Brocke *v.* Maynard, III. 110
Bromwich *v.* Lloyd, III. 78
Calvin's case, I. 417
Cavalchant *v.* Maynard, III. 110
Cawdry's case, I. 281
Chandelor *v.* Lopus, III. 268
Chat *v.* Edgar, III. 83
Clarke *v.* Martin, III. 89
Clark *v.* Tousey, I. 462
Coggs *v.* Bernard, III. 158, 264, 333
Crane *v.* Bell, III. 112
Dalton *v.* Angus, III. 695
Dartmouth College case, III. 253
Dunlop *v.* Silver, III. 72
Dutch West India Co. *v.* Van Moses, III. 206
Eaglechild's case, III. 73
East India Company *v.* Sandys, I. 330
Edgar *v.* Chut, III. 83
Edie *v.* East India Co., III. 74
Emerson *v.* Sallanova, III. 110
Five Knights' case, II. 544
Forward *v.* Pittard, III. 159
Grant *v.* Vaughan, III. 83
Hals *v.* Hyncley, II. 724
Hawkins *v.* Cardy, III. 86
Horne *v.* Ivy, III. 205
King *v.* Lake, III. 471
Liardet *v.* Johnson, III. 144
Lickbarrow *v.* Mason, III. 47
Lowe *v.* Paramour, II. 400
Luke *v.* Lyde, III. 14, 46
McCulloch *v.* Houston, III. 95
Morse *v.* Slue, III. 156
Phillips *v.* Savage, I. 462
Pillans *v.* Van Mirop, III. 74
Pinnell's case, II. 132
Queen *v.* Jackson, III. 820
Queen *v.* Millis, III. 815
Quo Warranto Case *v.* London, I. 705
Rex *v.* Bigg, III. 212
Russell *v.* Men of Devon, III. 167
Salmon *v.* Hamburg Co., III. 230
Sheldon *v.* Hentley, III. 84
Ship Money case, I. 699
Six Members' Case, II. 546
Southcote's Case, III. 152
Sutton's hospital, case of, III.

Thorley *v.* Lord Kerry, III. 472
Tyrrel's case, II. 747-748
Williams *v.* Lloyd, III. 154
Williams *v.* Williams, III. 84
Winthrop *v.* Lechmere, I. 445
Winton *v.* Wilks, III. 179
Woodward *v.* Rowe, III. 74
Causa and consideration, III. 279
Cavendish, Chief Justice, I. 668
Censorship of press, III. 462
Certiorari, writ of, II. 538
Chancellor and the English law, I. 349; jurisdiction regarding foreigners, I. 296
Chancery, court of, I. 214; reforms during Commonwealth, I. 471; court of, I. 523-531; early records, II. 93; reports, II. 149-153; history of court of, II. 219-54; ordinary jurisdiction, II. 234-236; jurisdiction of, recognized by statute, II. 244; courts of, in American Colonies, II. 779-809; and law merchant, III. 50
Charles I., trial of, II. 518-519
Charter, as form of legislation, I. 53; of the Forest, II. 26; and corporateness, III. 171-172
Chartered companies, III. 194, 199-201
Chelmsford, Lord, I. 738
Chief Justiciar, office of, II. 211
Choke, Judge, I. 674
Choses in action, transfer of, III. 609-610
Christianity, influence of, upon Roman law of divorce, III. 801-804
Church, law of, and defamation, III. 450-53
See also CANON LAW
Cinque Ports, I. 295
Citations, law of, I. 344
Civil law, study of, I. 285
Civil procedure, code of, II. 664
Clarendon, Assize of, I. 128; constitutions of, I. 259, II. 288; assize of, II. 444-445
Clementines, I. 264
Cnute, code of, I. 28; II. 12; laws of, II. 17
Cockburn, Judge, I. 766-771
Code, civil and ecclesiastical, I. 190; early, for Virginia, I. 404; meaning of, II. 643-647; pleading, development of, II. 643-690; states, II. 646-647, 672; civil, in America, II. 670-671
Codification, I. 58; in Germany, I. 361, 592; in American Colonies, I. 410; demand for, during Commonwealth, I. 481, 511-515, 564-568; in France, I. 592; for India, I. 603-604

Coemptio, marriage by, III. 787
Coke, Sir Edward, and admiralty, I. 314, 696-699; II. 47; Reports, II. 130-134
Coleridge, Lord Chief Justice, I. 744, 807
Collatio bonorum and Hotchpot, I. 212
Collatio Hibernica, I. 253
Colonies, American, English law in, I. 367-463; appellate jurisdiction over, I. 383; appeals from, to England, I. 383-387; American, and laws of England, I. 435; and corporate autonomy, I. 452; theory of extension of English law to, I. 450; laws of, contrary to laws of England, I. 457; American, sources of law of, II. 164-168; American, courts of chancery in, II. 779-809; law of corporations in, III. 236-255.
Color in Pleading, II. 630
Commenda, III. 183
Commercial courts, I. 298-304
See also MERCHANT, LAW
Common carrier, liability of, III. 148-160
Common law, I. 50; relation of early Mass. law to, I. 379-380; and equity, I. 517-518; in Anglo Saxon period, II. 67; procedure acts, II. 675-678
Common pleas, court of, I. 519; II. 210; reports, II. 146-7
Common recovery, I. 147; III. 677
Commons, House of, opposition to jurisdiction of chancellor, II. 241-244; rights of, III. 697
Communitas, III. 163
Complaint and proof, in early procedure, II. 370-375
Comyns, II. 49
Concubinage, III. 806-808
Confarreatio, marriage by, III. 787
Confessions, II. 497-498
Conflict of laws, I. 22
Confrontation with witnesses, II. 499
Connecticut, early laws of, I. 386, 431-463; chancery jurisdiction in, II. 790-792
Connubium, III. 806
Conquest, extension of law through, I. 419-424
Conscience, in chancery, II. 722-736
Conservators of the Peace, I. 154
Consideration, II. 746; III. 278; executed, III. 288; doctrine of, III. 327-330; doctrine of and third beneficiary, III. 343
Consimili casu, writs in, II. 723
Consistory Court, II. 275
Consolato del Mare, I. 290; II. 339-342; III. 106
Constantine, reign of, I. 335
Contingent remainders, recent history of, III. 684-685

Contract, in Anglo Saxon law, I. 104; in early English equity, II. 716-721; history of, III. 320-338; agency in, III. 390-398 See also Assumpsit
Contractor, and the law of agency, III. 405
Contracts, use of term, III. 306
Conveyancing, beginning of modern, I. 23; law of, III. 703-719
Convocation, I. 274; II. 279
Coparceners, I. 142
Copyhold, law of, III. 696-697
Coroner, office of, II. 410; inquest, II. 457
Corporate by-laws and colonial self-government, I. 452
Corporations, history of law of, III. 161-182; and combinations, I. 570
Corpus Juris Canonici, I. 46-47; II. 257
Corpus Juris Civilis, I. 160
Cottenham, Lord, I. 736-737
Council, jurisdiction concerning foreigners, I. 296; in American Colonies, jurisdiction of, I. 393-399; jurisdiction of, II. 225-230
Counsel in criminal cases, II. 504, 527
County Court, I. 91, 542
County, crimes committed out of, I. 297
Court, of High Commission, I. 279; of Appeal in Chancery, I. 800-803; of Appeal, I. 809-824
Coutumiers, I. 57
Covenant, action of, III. 324
Craft guilds, I. 326
Cransworth, Lord, I. 738
Crime, in Anglo Saxon law, I. 99-101; early Mass. law, I. 375-376
Criminal jurisdiction, of admiralty, I. 310-313; of ecclesiastical courts, II. 288-291; in admiralty, II. 316, 354
Criminal law, Reforms of, during Commonwealth, I. 483; reform since 1826, I. 548-556
Criminal procedure, history of, II. 443-530
Croke's Reports, II. 135
Cromwell, Protector, I. 700
Cross-examination, II. 443, 694
Crown, cases reserved, court of, I. 549
Curia Regis, I. 123; II. 209
Custom, local, in King's court, II. 116; of merchants, proof of, III. 11; proof of, III. 13
Customary duty, assumpsit for, III. 293

Damages, and law of agency, III. 412-414
Death, devolution of property on, III. 770-781
Debentures, to bearer, III. 17

Debt, action of and third beneficiary, III. 351-60
Decedents, estates, claims, and liabilities, III. 756-763
Decemviral legislation, I. 334
Declaratory legislation, I. 63
Decree and judgment, II. 731
Decretum Gratiani, I. 47, 258; II. 257
Defamation, ecclesiastical jurisdiction over, abrogated, II. 297; history of, III. 446-473
Delaware, chancery jurisdiction in, II. 801-802
Delegates, high court of, I. 742; II. 279; to hear appeals from admiralty, I. 308; high court of, II. 279
Denman, Lord, I. 532, 743
Deodand, I. 133; III. 515
Dependencies, binding force of law in, I. 381; theory of extension of law to, I. 417-430
Descent, common law of, in American Colonies, I. 431-463; III. 690
Determinable fee, I. 674
Detinue, III. 312; as remedy on bailment, III. 432-437
Dialogue of the Exchequer, II. 33, 74
Digest of Justinian, I. 31
Dilatory pleas, II. 760
Diocletian, reign of, I. 335
Dionysius Exiguus, I. 16, 252
Diplomatic Age, I. 27
Dissolution of corporations, III. 231-34
Distribution, statute of, I. 230
Divorce and matrimonial causes, court for, I. 536-537
Divorce, in ecclesiastical courts, II. 299-300; Roman law of, III. 798-801; canon law of, III. 822-23; history of law of, in England and United States, II. 823-829
Doctor and Student, II. 46
Doctors' Commons, I. 534-535
Documents, Anglo Saxon, II. 64-65
Dogs, liability for, III. 515
Dooms, I. 19, 96-98; Anglo Saxon, I. 42; II. 64
Domesday Book, II. 23, 76-77
Dos, III. 794-795
Dower, III. 690, 817
Droits, admiralty, I. 321
Duel, as substitute for action for defamation, III. 460
Duke of York's laws, I. 391
Dunsaete, law of, II. 13
Dyer, Judge, I. 692; Reports, II. 134

Easements, under land title registration, III. 713
Eastern and Western Empire, separation of, I. 18

Ecclesiastical Courts, I. 534-535; reports of, II. 154, 255-311; statutes of 19th century regulating jurisdiction of, II. 284-287; criminal jurisdiction, II. 288-291; corrective jurisdiction, II. 291-297; and feoffee to uses, II. 740; pleading in, II. 767
Ecclesiastical jurisdiction, I. 154-155, 271; and law of marriage, III. 812-815
Ecclesiastical law, I. 24-26, 127, 225, 248-288
Edictum Theodorici, I. 16
Edward the Confessor, laws of, II. 17
Edward I., legislation of, I. 55; and the common law, I. 349; statutes of, II. 27; establishment of courts, II. 209-218
Edward III., and the common law, I. 349
Edward VI., legislation concerning canon law, I. 277
Ejectionae firmae, III. 617-622
Ejectment, action of, I. 520; history of, III. 611-645
Eldon, Lord, I. 494, 499, 724, 732-736
Election petitions, I. 537-538
Elizabeth, Queen, legislation concerning canon law, I. 279
Ellenborough, Lord, I. 741
Ellsmere, Lord Chancellor, I. 698
Enclosure act, 1845, III. 698
English language in legal proceedings, I. 480
Enquéte par tourbe, I. 43
Entry, writs of, III. 638-639
Equity, natural, as rule of decision, I. 418, 437, 451, 600; II. 221-240; in common law, I. 517-518; early English, II. 705-721; ethical standard of, II. 738; and parol promises, III. 308; fusion of law and, III. 702
Equity jurisdiction, in New York, I. 394
Equity pleading, II. 742-778
Erle, Judge, I. 744
Esher, Lord, I. 814-815
Essoins, II. 616
Evidence, in early Massachusetts, I. 378; exclusion on account of interest, I. 521; history of, II. 443, 691-701; in law merchant, III. 39
Examination, of parties, II. 754-761; of witnesses, II. 761
Exchequer Chamber, I. 742, 754-756
Exchequer, Court of, I. 519; II. 212-215; dialogue of the, II. 33, 74; rolls, II. 32; reports, II. 147-148
Excommunication as process of ecclesiastical courts, II. 310-311
Executor, history of law of, III. 737-769; limitation of, to chattels, III. 752-756; representation by, III. 756-763; right to residue, III. 764-768
Ex officio procedure, II. 500-507
Expansion of law, I. 355-357; theory of, I. 417-430, 574-621

Extension of law, I. 574-621
Extradition statutes, I. 550
Extravagants, I. 262
Eyre, justices in, II. 216, 414, 446

Factor, assumpsit against, III. 291; and the law of agency, III. 394, 397-398
Fairfax, Sergeant, I. 675
Fairs, courts of, I. 298-299; III. 9
Fees, payment of magistrates by, II. 470
Feoffee to uses, liability of, III. 435-436
Formedon, writ of, III. 639
Feudal tenures, abrogation of, I. 351
Fideicommissa, I. 218
Fidei laesio, II. 714
Fides in equity, II. 720
Finch, Sir Thomas, I. 674
Fines, I. 131
Fineux, Chief Justice, I. 687
Fire, liability for, III. 511
Fitzherbert, II. 44; Abridgment, II. 47, 98
Fitzpeter, Geoffrey, I. 639
Five Knights' case, II. 544
Fixtures, law of, III. 702
Flambard, Ranulf, I. 629
Fleta, II. 37; law treatise, II. 84
Folkland, I. 105
Foreign merchants and charter privileges, I. 301
Foreign trade and law merchant, I. 327
Forest law, Cnute's, I. 113; II. 18
Forfeiture gage, III. 652-656
Fortescue, John, I. 678-680; II. 45
Frank pledge, view of, I. 129; II. 448; III. 379
France, history of law in, I. 360-362; codification in, I. 592
Franchises, corporate, III. 252; transfer of, III. 608
Frankish law, I. 40-42
Fraud and the law of agency, III. 408
Freedom of trade, I. 330
French Revolution, and the law, I. 358; and the English law, I. 498
Fundamental law, conception of, I. 377, 397
Fundamental constitutions of the Carolinas, I. 407
Fusion of law and equity, II. 678

Gage, of land, III. 646-672
Gascoigne, Chief Justice, I. 671

Gavelet, custom of, III. 661
General average, I. 241
Gentilis, Albericus, I. 182
Georgia, chancery jurisdiction in, II. 808-809
Germanic laws, oldest written, I. 19
Germany, history of law in, I. 360-362; reception of Roman law in, I. 591; codification in, I. 592
Gild merchant, I. 300; III. 176-179
Glanville, I. 636; treatise, II. 34, 73
Godolphin, treatise on admiralty, III. 41
Goldsmiths as bankers, III. 82
Grand jury, origin of, II. 488
Gratian's Decretum, I. 32, 258
Great Assize, I. 125
Guaranty, III. 267
Guests, liability for, III. 384

Habeas corpus, II. 531-548
Haddon, Dr. Walter, I. 191
Hale, Sir Matthew, I. 699; II. 48, 56
Halsbury, Lord, I. 834-835
Hannen, Judge, I. 808
Hardwicke, Lord Chancellor, I. 715
Harvard College, incorporation of, III. 241
Hawkins, Wm., II. 48
Hengham, Ralph, I. 651; Summa, II. 38
Henry I., laws of, II. 16
Henry II., and the common law, I. 347-348; laws of, II. 24-26
Heresy, writ concerning, I. 284; II. 292-295
Herschell, Lord, I. 831-834
High Commission, court of, II. 271, 282-284
Hilary Rules, II. 654
Hindu law, I. 597-599
Historical school of jurisprudence in Germany, I. 572
Holmes, O. W., common law, II. 58
Holt, Lord, and the law of promissory notes, III. 72-97
Homine Replegiando, writ de, II. 476-533
Hotchpot and collatio bonorum, I. 212
Hotman, Francis, I. 181
House of Lords, court of, I. 756-768, 824-835; reports of, II. 154
Howard, William, I. 641
Hundred Court, I. 90
Husband and wife, property relation of, in Roman law, III. 793-796; gifts between, III. 795-796; property relations of, in English law, III. 815-822

Implied assumpsit, III. 280-298
Imprisonment for debt, I. 543-548
Improvement of land act, III. 679
Incorporation laws, general, III. 255
Indebitatus assumpsit, III. 276-280
India, English law in, I. 597-619; code of civil procedure in, II. 686-690
Indian Codes, I. 603-604; working of, I. 607-612
Ine, Code of, II. 9
Infants, chancery jurisdiction over, I. 220; torts of, III. 510; real estate of, III. 688-689
Inheritance, Anglo Saxon law of, I. 106; law of, in Massachusetts, I. 374; act of 1833, III. 691
Injunctions, I. 193; and interdicts, I. 223
Injuries, in Anglo Saxon law, I. 102
Inns of court, I. 199, 266; during Commonwealth, I. 477, 646, 681-684, 701; exclusion of attorneys from, II. 639
Inn-keepers, law of, III. 155; liability, III. 385
Inquests, I. 116
Inquisition, II. 367; procedure by, in chancery, II. 728
Insolvency, I. 543-548
Inspection of merchandise, III. 22
Instance jurisdiction, I. 310
Insurance companies, in America, III. 247
Insurance law, history of, I. 242, 329; III. 98-116
International law, and the admiralty courts, I. 325, 562-564
Intestacy, English law of, in American Colonies, I. 431-463; III. 690; mediæval law of, III. 723-36
Invention, disclosure of, III. 141
Inventor, true and first, III. 139
Ipswich, maritime court, I. 291; Domesday of, I. 292; Domesday book of, III. 11
Ireland, English law in, I. 356
Irnerius, law teacher, I. 31
Issues in pleadings, II. 621-622
Italian law, influence of, upon negotiable instruments, III. 53-56
Itinerant Justices, I. 51; II. 216

Jamaica, law of, I. 419
James I., legislation concerning canon law, I. 282
James, Judge, I. 802
Jeffreys, Judge, I. 705; trials by, II. 520
Jerusalem, Assizes of, I. 45
Jessel, Sir George, I. 810-813
Jews, exchequer of, and Jewish obligations, III. 664-668
Joint stock companies, III. 192, 200
Judge and jury, I. 767-769

Judges, non-professional, in American Colonies, I. 388; payment of, I. 478
Judgment, in ancient law, I. 96; and decree, II. 731
Judicature, act of 1873, I. 805; acts, II. 679-681
Judicial Committee of Privy Council, I. 835-836
Judicial writs, II. 559
Judiciary law, I. 52
Junius, letters of, I. 240
Jurists, development of law through, I. 361
Jury, I. 116, 126; in early Massachusetts, I. 378-379; in early American law, I. 386; in American Colonies, I. 393; trial, I. 708; development of, II. 408-416; punishment for verdict, II. 494; special, for mercantile cases, III. 14, 28
Jus Gentium, I. 340-341, 584
Justices of the Peace, II. 217, 411, 449
Justinian, I. 16-18; codification of, I. 345

Kent, James, Law Studies of, I. 837-847
Kenyon, Chief Justice, I. 719
King, court of, I. 50, 123; peace of, I. 101; jurisdiction of, over crimes, II. 404; peace of, in Middle Ages, II. 403-417
Kingsmill, Richard, I. 687
Knight-Bruce, Justice, I. 800-801

Laesio fidei, III. 307
Land, distribution of, in New England, I. 434
Land Books, Anglo Saxon, II. 64
Land companies, early in America, III. 244-249
Land law, as nucleus of English law, I. 354-355
Landlord and tenant, III. 699-702
Land transfer, III. 707-719; act, 1897, III. 691, 707
Lanfranc, Archbishop of Canterbury, I. 628; II. 75
Langdale, Lord, I. 501, 740
Language, of the law, I. 480, 714; of charters and statutes, II. 198-202; legal, II. 421, 610
Law merchant, see Merchant, law
Law reform, committee of, 1653, I. 470, 482
Law schools, at Pavia, I. 30, 197, 262, 590, 646, 684, 701
Law studies, revival of, I. 590, 681-684; of Chancellor Kent, I. 837-847
Lawyers, absence of trained, in American Colonies, I. 369-370; in early Massachusetts, I. 385; in American Colonies, I. 403, 406-409, 412
Lease and release, III. 705
Leasing powers, under settled land acts, III. 683
Legacies, I. 220
Leges Barbarorum, I. 19-20, 34-40; II. 156

Leges, private collections under names of, II. 16-18, 72-73
Legislation, I. 40-42, 54-58; in Massachusetts, I. 373; function of, in extension of law, I. 583-585
Letchford, Plain Dealing, I. 382
Lex and jus, III. 40
Libel, early law of, III. 447
Liens on land, III. 656-660; by warranty, III. 657-658; by dower, III. 658-660; of feudal service and rent service, III. 660
Limitation act, 1874, III. 693
Limitation of liability, III. 192, 229-231
Limitations, statute of, 1833, III. 693; statute of, under land title registration, III. 715
Lindley, Lord, I. 816
Litis contestatio, II. 757-760, 768
Littleton, Sir Thomas, I. 169, 676; II. 46; Tenures, II. 94
Liverpool, court of passage, I. 300
Livingston, Edward, and the codes for Louisiana, I. 508-509; II. 657
Local community unincorporated, III. 165 166
Local courts, in 13th century, I. 561; der ıd for, during Commonwealth, I. 475-476
Local law and common law, I. 60
Lombards, laws of, I. 19; and history of insurance, III. 110
Lombard jurists, influence of, upon negotiable instruments, III. 59-70
London, White Book of, I. 292, 300; Judicia Civitatis, II. 11
Lord and Man, I. 98
Louisiana, Livingston's Codes for, I. 508-509
Lowther, Hugh, I. 656
Lucy, Richard, Chief Justiciar, I. 637
Lunatics, torts of, III. 509; real estate of, III. 699
Lushington, Judge, I. 753
Lyndhurst, Lord, I. 725
Lyndwood, Provinciale, I. 265; II. 258

Magna Charta, II. 26, 80
Malynes, Gerard, on the law merchant, III. 8, 77
Manor, III. 165
Mansfield, Lord, I. 716; and the law merchant, III. 13-15, 75; and insurance law, III. 116; and patent laws, III. 144
Manus marriage, III. 786-788
Marine insurance, III. 107
Maritime courts, I. 294-297; during Commonwealth, I. 474-475
Maritime law, I. 230-236, 292; II. 321-328
Marriage, civil, in early Massachusetts, I. 374; law of, during Commonwealth, I. 484; in Roman and English law, III.

782-833; prohibited degrees in, III. 805-809; canon law of, III. 809-812; disabilities regarding, III. 813-814; form of, in England, III. 814-815
Married women, property rights, III. 686-688; in equity, III. 818-819; legislative changes, III. 819
Mary, Queen, legislation concerning canon law, I. 278
Maryland, early law of, I. 400-403; chancery jurisdiction in, II. 803-804
Massachusetts, early law of, I. 372-386; distinctive doctrines of early law, I. 374; chancery jurisdiction in, II. 779-786
Masters in Chancery, I. 215
Matrimonial jurisdiction, I. 226; of ecclesiastical courts, II. 298-301
Maule, Judge, I. 745
Merchant, law, I. 47-48, 104, 220, 237-246, 289-331; custom of, I. 246; law in relation to internal and foreign trade, I. 327; law, distinctive doctrines, I. 20, 327-329; contributions to common law, III. 34-50; history of, III. 7-15; and master's liability, III. 382; proof of, III. 44, 74
Merton, statute of, I. 260; provisions of, II. 26
Mettingham, John, I. 652
Mining companies, early in America, III. 244
Mirror of Justices, II. 38, 85
Misadventure, responsibility for, III. 483-489
Mistake, I. 223
Modern reports, II. 138
Money, had and received, I. 241; III. 295-297
Montague, Chief Justice, I. 690
Moore's Reports, II. 134
Morals, offenses against ecclesiastical jurisdiction, II. 295-297
Mortgages, I. 218; history of, III. 646-672; on registered land, III. 717
Mortmain, statute of, I. 154; III. 175
Moslem law, I. 597-599
Municipal corporations, III. 162

Napoleon, Codification of, I. 361
Natura Brevium, II. 44
Natural equity, as rule of decision, I. 600
Natural law, as rule of decision, I. 418, 437, 451
Nature, law of, and law merchant, III. 28, 42, 45
Negotiable instruments, early history of, I. 304, 329; III. 51-71
Negotiable paper and the staple, III. 17
New England, popular law in, I. 370; Agrarian system, I. 432
New Hampshire, early law of, I. 387; chancery jurisdiction in, II. 785-786

New Jersey, early law in, I. 395-396; chancery jurisdiction in, II. 795-797
New York, early law of, I. 390-395; codification in, II. 657-661, 670; chancery jurisdiction in, II. 792-795
Nisi prius rulings on evidence, II. 696
Norfolk, trial of, II. 495-96
Norman Conquest, effect of, I. 49-53; element in English people, I. 625; law, sources of, II. 68-71; influences, II. 213
Northampton, Assize of, I. 186; II. 445
North Carolina, chancery jurisdiction, II. 806
Nottingham, Lord, I. 674, 702
Novelty in patents, III. 145
Nudum pactum, III. 334
Numerical system of evidence, II. 693

Oath, I. 92; trial by, II. 383-392
Odio et atia, writ de, II. 476, 534
Oleron, laws of, II. 325
Ordeal, I. 93, 116; trial by, II. 392-396, 486-488
Ordinances and statutes, II. 180
Outlawry, I. 95
Oyer and Terminer, commissions of, II. 253

Pannormia, I. 254
Park, Sir James, on law of insurance, III. 116
Parke, Baron, I. 747
Parliament, I. 157; Rolls, II. 90, 178-180, 191-192; relief by on petition, II. 230-231
Parliamentary commission, on pleading, II. 652
Parol contracts, early history of, III. 304-319
Parol evidence rule, II. 694
Partners, law of, in law merchant, III. 48
Partnership, I. 221; history of law of, III. 183-194
Patents, history of English, III. 117-147; summary of grants of, III. 138
Pateshull, I. 642
Patteson, Judge, I. 744
Peace, King's, in Middle Ages, II. 403-417
Peculiar, court of, II. 276
Pecunia trajectitia, I. 243
Penal servitude, I. 555-556
Penitentials, I. 252
Pennsylvania, early law of, I. 396-400; chancery jurisdiction in, II. 797-801, 810-823; equity jurisdiction in, II. 797-801, 810-823
Peregrini, in Roman law, I. 339-340
Perpetuities, rule against, I. 703, III. 685

Personal laws, system of, I. 20, 38-40
Petty jurisdiction, in Massachusetts, I. 377
Piepoudre, court of, I. 237, 298; III. 9, 35
Pipe Rolls, II. 77
Pipe Roll Society, II. 60
Piracy, I. 296, 297, 305, 312; admiralty jurisdiction over, II. 320
Pleading, in early Massachusetts, I. 377, 658-659; development of, II. 614-642; and law of agency, III. 410-412
Plowden, Reporter, II. 128-130
Poland, law of, I. 594
Pole, Reginald, I. 172
Police, organization of, I. 552-555; history of, II. 454-456
Pollock, Baron, I. 746
Popular law, in New England, I. 370; in New Jersey, I. 395
Positions in civil law pleading, II. 762
Powers, under settled land acts, III. 682-683
Praemunire, statute of, I. 272; II. 261
Praetors and chancellors, I. 216
Praetor Peregrinus, I. 340, 581
Praetors, Roman, II. 220-223
Praetorship in Rome, I. 235
Precedents, authority of, repudiated, I. 388; authority of, in American Colonies, I. 409; use of, II. 111
Prerogative court, I. 230; II. 278
Prerogative, royal, and confirmation of colonial law, I. 458
Prescription, act, 1833, III. 694; law of, III. 694-696
Presentment, I. 129; by grand jury, II. 415
Press, censorship of, III. 462
Presumption of innocence, II. 514
Primogeniture and wills, III. 780
Primogeniture, in New England, I. 436
Printing of law books, I. 687
Prison reform, I. 555-556
Prisoners' Counsel act, II. 469
Private bills, I. 538
Privilege from legal process, II. 589
Privy Council, and law of American Colonies, I. 383, 763-764; jurisdiction regarding patents, III. 146; reports of, II. 154; ecclesiastical jurisdiction of, II. 282
Prize jurisdiction, I. 323; of admiralty, II. 361
Probate, divorce, and admiralty courts, I. 798-800
Probate jurisdiction, I. 228; II. 301
Procedure, ancient, I. 92-96; in American Colonies, I. 377-379, 386-389, 392, 397, 405; technicalities of, I. 520; in high court of admiralty, II. 343; of law merchant, III. 35-39
Process, in ancient law, I. 95-96; in real actions, II. 616

Profession, legal, division into barristers and attorneys, I. 646; III. 756
Prohibition, writ of, I. 155, 314; II. 260
Promissory notes, history of, III. 72-97.
See also NEGOTIABLE INSTRUMENTS
Proof, in ancient law, I. 92-94
Provinces, of Rome, and Roman law, I. 578-585
Provinciale of Lyndwood, I. 265
Provisions of Merton, II. 26
Provisors, statutes of, II. 261
Prynne, Lawyer, I. 703; animadversions, III. 43
Pseudo-Isidore, I. 24-25
Public Record Office, II. 60
Pulton, edition of statutes by, II. 173-176
Pynson, printer of Year-books, II. 99

Quadripartitus, Law book, II. 15
Quare ejecit infra terminum, III. 619-622
Quarter Sessions, II. 217
Quasi-contracts, III. 292-298

Raleigh, I. 642; trial of, II. 498
Ratification, doctrine of, III. 400-404
Real actions, III. 637-639
Real property, history of the law of, in 19th century, III. 673-718
Real writs, III. 612-616
Reception, of Roman law, I. 59; of laws, I. 290; of common law in America, I. 368, 408
Rechtsbücher, I. 56; II. 156
Rectitudines Singularum Personarum, II. 63
Recognition, I. 116
Record Commission, II. 59
Records, Judicial, II. 29-30, 78, 81
Record, matter of, in ecclesiastical courts, II. 776
Reeves, John, History of English Law, II. 56
Reformation of ecclesiastical laws, I. 191
Reformation, and English Law, I. 350; and the canon law, II. 264-268
Reform Bill of 1832, I. 352
Register of Writs, II. 86, 549-596
Registration system during Commonwealth, I. 474, 485
Registration of title, III. 708-719
Regulated companies, III. 199
Renaissance, English law and, I. 168-207
Rent, transfer of, III. 604-05
Replevin and distress, III. 428, 431-432

Reporters, II. 44
Reports, II. 31-32, 86, 123-154; license for printing, II. 124; and Records, II. 597
Requests, court of, I. 202, 694; court of, II. 252
Respondeat superior, III. 380-382, 532
Restraint, of Trade, I. 671; on Alienation, I. 670
Retainer, right of, III. 743
Reversion, transfer of, III. 605-607
Review, commission of, II. 281
Rhode Island, early law of, I. 388-390; chancery jurisdiction in, II. 787-790
Rhodian law, I. 231
Robbery, appeal of, III. 418-422
Roger of Salisbury, I. 631
Roman law, as subsidiary law, I. 30; position of, I. 59-65; reception of, I. 161; influence upon the law of England, I. 208-247; extension to provinces, I. 578-585; reception of, in Germany, I. 591; reception of, in Scotland, I. 591; process of expansion, I. 612-613; in England, II, 74-76; pleadings in, II. 754-758; trial in, II. 757-758; and agency, III. 373-374
Roman-Dutch law, in New York, I. 393
Rome, history of legal development, I. 332-364
Romilly, Samuel, I. 500-501, 722
Royal Legislation, I. 61
Rules of court, procedure by, II. 682-686
Russia, law of, I. 593

Sale, in Anglo-Saxon law, I. 103
Salica, lex, I. 35
Salman, in German law, II. 707
Saltonstall, and surrender of Connecticut charter, I. 444
Sampson, Abbott, I. 638
Saunders, Edmond, I. 704; Reports of, II. 137
Scandalum magnatum, III. 453
Scandinavian countries, law of, I. 56, 594
Scope of employment, doctrine of, III. 406
Scotland, reception of Roman law in, I. 197, 591; law of, I. 266; English law in, I. 356
Scriptures, authority of, I. 396; in American Colonies, I. 411
Scroggs, Chief Justice, I. 704
Seal, corporate, requirement of, III. 209-213
Seisin, III. 591-610
Selborne, Lord, I. 826-828
Seldon Society, II. 60
Self-Crimination, privilege against, II. 693; III. 505
Self-defense, III. 508

Serjeants, II. 118
Servants, liability for, III. 520-537; liability for torts of, III. 495-503
Settled estates act, 1877, III. 680
Settled land act, 1882, III. 681; recent development in English law of, III. 674-686; repairs of, III. 686
Seven Bishops, trial of, I. 707
Shareholders, rights of, III. 217
Shares, nature of, III. 217-224
Sheriff, liability for deputy, III. 386-387
Ship-Money case, I. 699
Shire Court, I. 114
Siete Partidas, I. 161, 263
Six Members case, II. 546
Skrene, lawyer, I. 673
Smith, Sir Thomas, I. 176; II. 47
Somers, Lord Chancellor, I. 713
Sources of Law, I. 36; of mediæval law, II. 155-163; of American colonial law, II. 164-168
South Carolina, chancery jurisdiction in, II. 807-808
Southcote's case, III. 152
Special assumpsit, III. 260-276
Special pleading, I. 747, 779; II. 638
Specialty debts, III. 322
Specification in patents, III. 143-144
Spiritual courts, during Commonwealth, I. 473
See also Ecclesiastical Courts
Staple, the merchants of the, III. 16-33
Staple courts, III. 25; appeal from, III. 38; disappearance of, III. 43
Staple, statute of, III. 30, 37
Staple Towns, I. 302
Star Chamber, substitutes for, I. 468; II. 251; trials, II. 500-507; procedure in, II. 501-507, 529; jurisdiction of, in mercantile cases, III. 28; and sedition, III. 454-456; and law of libel, III. 463-470
Stare decisis, rule of, II. 111
Statute Rolls, II. 80, 183-187, 196
Statutes, interpretation of, I. 273; of English church, I. 286; English in America, I. 402; English, in American Colonies, I. 408, 416-430, 436, 455; early English, II. 26; and ordinances, II. 42; English, historical survey, II. 167-205; public and private, II. 182; drafting of, II. 188-190; promulgation of, II. 202-205; merchant, security by, III. 665
Statutes Cited
Acton Burnell, Statute of, I. 140; III. 19
Edward I., statutes of, II. 27

Kent, statutes of, II. 9
Limitations, statute of, 1833, III. 693; statute of, under land registration, III. 715
Mortmain, statute of, I. 154; III. 175
Praemunire, statute of, I. 272; II. 261
Provisors, statutes of, II. 261
Staple, statute of, III. 30, 37
Statute of Acton Burnell, I. 140
Statute De Donis, I. 145
Statute of distribution, I. 230
Statute of Frauds, I. 351
Statute of Mortmain, I. 154
Statute of Praemunire, I. 272
Statute of promissory notes, III. 92-94
Statute of Staple, I. 292
Statute of Uses, I. 66, 694
Statute of Westminster the Second, I. 145-153
Statute of Wills, I. 695
Statute of Winchester, I. 153
Statutes of Appeals and Submission, I. 275
Westminster, statute of, the second, I. 145-153
Winchester, statute of, I. 153; II. 447
Staunforde, Sir William, Pleas of the Crown, II. 47
Staunton, Hervey, I. 654
Stock, transfer of, III. 219-224
Stoppage in transitu, III. 49
Stowell, Lord, I. 244, 749-753
Strict settlement, III. 675
Study of law, I. 348, 646, 681-684; at Inns of Court, I. 477; revival of, I. 590
Submission, contract of, III. 290
Subpœna, writ of, I. 193; II. 245
Subsidiary law, common law as, I. 372, 400, 411
Suit, debts provable by, III. 323
Summary jurisdiction, I. 550; in early Massachusetts, I. 374
Supremacy, act of, II. 269
Supreme Court of Judicature, I. 516, 539-542
St. John, Oliver, I. 699
St. Leonards, Lord, I. 737
Suretyship, development of, II. 718

Talbot, Lord Chancellor, I. 715
Technicalities of procedure, I. 520
Tenterden, Lord, I. 742
Term Reports, II. 145-146
Territorial law, I. 42-49

Testamentary jurisdiction, I. 259; of ecclesiastical courts, II. 301-310
Thelluson Act, III. 685
Theodorici Edictum, I. 16, 346; II. 156
Theodosius, code of, I. 344, 589
Theological questions in litigation, I. 276
Thornton's Summa, II. 37
Throckmorton, trial of, II. 490-495
Thurlow, Lord Chancellor, I. 715
Tithes, III. 699
Title, registration of, III. 708-719
Tolzey, court of Bristol, I. 300
Torts, master's liability for, III. 377-389; responsibility for, III. 474-537
Torture, absence of, in England, II. 462
Tottell, printer of Year-books, II. 100
Transportation for crime, I. 555-556
Trent, Council of, and law of marriage, III. 810
Tresilian, Chief Justice, I. 668
Trespass, writ of, II. 412-579, 582, 618; de Bonis Asportatis, III. 422-30; to try title, III. 543-645
Trials, older modes of, II. 367-402; in 17th century, II. 512-517
Trover, history of, III. 417-445
Trust and third beneficiary, III. 360-367
Trusts, II. 247; origin of, II. 747-752
Twelve Tables, law of, I. 338
Tyrrel's case, II. 747-748

Undisclosed principal, III. 390
University degree, in civil and canon law, I. 280-285
Unjust enrichment, III. 295
Use and occupation, III. 299-303
Use upon use, II. 748
Uses, doctrine of, in equity, II. 706-716; and trusts, origin of, II. 737-752
Utility in patents, III. 146

Vacarius and Roman law in England, II. 75
Vengeance and liability for tort, III. 480
Vere, Alberic de, I. 631
Victoria, Queen, progress of law during reign of, I. 516-557
Virginia, early law of, I. 403-407; chancery jurisdiction in, II. 805-806
Visigothorum, Lex Romana, I. 15, 346; II. 156
Vivum vadium, III. 668

Vocational duty, III. 265-268
Vote of share-holders in corporation, III. 224-226

Wager of law, excluded in law merchant, III. 35; II. 387-392
Warranty, III. 266-267
Watson, Lord, I. 828-830
Wergild, I. 98
Wessex, laws of, II. 9
Westbury, Lord, I. 787-789
Westminster Hall, I. 629
Westminster, statute of the second, I. 145-153
Wightman, Judge, I. 744
Wills, history of law of, in England, III. 704-705, 770-781
Willes, Judge, I. 775-777
William the Conqueror, laws of, II. 22-24
Willoughby, Chief Justice, I. 664
Winchester, statute of, I. 153; II. 447
Wisby, laws of, I. 231, 291
Withernam, capias in, II. 476-533
Witnesses, trial by, II. 376-383; in criminal cases, II. 523-526; compulsory process for, II. 636; employment of, and the law of evidence, II. 692-694; competency of, II. 693; compulsory attendance of, II. 693
Wolsey, Cardinal, I. 694
Writs, in consimili casu, I. 151; II. 28-29; register of, II. 86, 549-596; original and judicial, II. 559; de cursu, II. 561; groups of, II. 583-586; list of, II. 567-569, 572-578, 591-593
Wyclif, I. 178
Wykeham, William, I. 665

Yale College, charter of, III. 242
Year-books, I. 192, 649-651; II. 42, 86, 91-92, 96-122
Yelverton, Judge, I. 675

Zouch, on admiralty jurisdiction, III. 42

LIST OF AUTHORS CONTRIBUTING

AMES, JAMES BARR.
48. The Origin of Uses and Trusts.....II, 737-752
59. The History of Assumpsit.....III, 259-303
60. The History of Parol Contracts prior to Assumpsit .....III, 304-319
64. The History of Trover.....III, 417-445
67. The Disseisin of Chattels.....III, 541-590

ANDREWS, CHARLES MCLEAN.
13. The Influence of Colonial Conditions, as Illustrated in the Connecticut Intestacy Law...I, 431-463

BALDWIN, SIMEON EBEN.
58. History of the Law of Private Corporations.III, 236-255

BEALE, JOSEPH HENRY, JR.
17. The Development of Jurisprudence during the Nineteenth Century.....I, 558-573
54. The History of the Carrier's Liability.....III, 148-160

BIGELOW, MELVILLE MADISON.
75. The Rise of the English Will.....III, 770-781

BOWEN, BARON (CHARLES SYNGE CHRISTOPHER).
16. Progress in the Administration of Justice during the Victorian Period.....I, 516-557

BRODHURST, BERNARD EDWARD SPENCER.
48. The Merchants of the Staple.....III, 16-33

BRUNNER, HEINRICH.
23. The Sources of English Law.....II, 7-52

BRYCE, JAMES.
10. A Comparison of the History of Legal Development at Rome and in England.....I, 332-366
18. The Extension of Roman and English Law throughout the World.....I, 574-621
76. Marriage and Divorce under Roman and English Law.....III, 782-833

BURDICK, FRANCIS MARION.
49. Contributions of the Law Merchant to the Common Law.....III, 34-50

CAILLEMER, ROBERT.
74. The Executor in England and on the Continent .....III, 746-769

CARR, CECIL THOMAS.
55. Early Forms of Corporateness.....III, 161-182
CRANCH, WILLIAM.
51. Promissory Notes before and after Lord Holt..III, 72-97
DILLON, JOHN FORREST.
15. Bentham's Influence in the Reforms of the Nineteenth Century.....I, 492-515
FISHER, SIDNEY GEORGE.
46. The Administration of Equity through Common Law Forms in Pennsylvania.....II. 810-821
GREEN, ALICE STOPFORD (MRS. JOHN RICHARD).
4. The Centralization of Norman Justice under Henry II.....I, 111-138
GROSS, CHARLES.
72. The Mediæval Law of Intestacy.....III, 723-736
HALL, HUBERT.
33. The Methods of the Royal Courts of Justice in the Twelfth Century.....II, 418-442
HAZELTINE, HAROLD DEXTER.
70. The Gage of Land in Mediæval England...III, 646-672
HENING, CRAWFORD DAWES.
62. History of the Beneficiary's Action in Assumpsit .....III, 339-367
HEPBURN, CHARLES MCGUFFEY.
39. The Historical Development of Code Pleading in America and England.....II, 643-690
HOLDSWORTH, WILLIAM SEARLE.
9. The Development of the Law Merchant.....I, 289-331
24. The Year Books.....II, 96-122
29. The Ecclesiastical Courts and Their Jurisdiction .....II, 255-311
38. The Development of Oral and Written Pleading .....II, 614-642
HOLMES, OLIVER WENDELL, JR.
41. Early English Equity.....II, 705-721
63. The History of Agency.....III, 368-414
73. Executors in Earlier English Law.....III, 737-745
HULME, EDWARD WYNDHAM.
53. The Early History of the English Patent System .....III, 117-147
INDERWICK, FREDERICK ANDREW.
27. The Courts as Established under Edward the First .....II, 209-218
JENKS, EDWARD.
2. The Development of Teutonic Law.....I, 34-67
5. Edward I, the English Justinian.....I, 139-167

25A. List of Sources for Continental Mediæval Law .....II, 156-163
35. The Story of the Habeas Corpus.....II, 531-548
50. Early History of Negotiable Instruments.....III, 51-71

KENT, JAMES.
21. An American Law Student of a Hundred Years Ago.....I, 837-847

LANGDELL, CHRISTOPHER COLUMBUS.
44. The Development of Equity Pleading from Canon Law Procedure.....II, 753-778

MAITLAND, FREDERIC WILLIAM.
1. A Prologue to a History of English Law.....I, 7-32
6. English Law and the Renaissance.....I, 168-207
23. Materials for the History of English Law.....II, 53-97
36. The History of the Register of Original Writs .....II, 549-596
68. The Mystery of Seisin.....III, 591-610

MEARS, THOMAS LAMBERT.
30. The History of the Admiralty Jurisdiction..II, 312-364

MITCHELL, WILLIAM.
56. Early Forms of Partnership.....III, 183-194

PIKE, LUKE OWEN.
37. An Action at Law in the Reign of Edward III.....II, 597-613
42. Common Law and Conscience in the Ancient Court of Chancery.....II, 722-736

POLLOCK, SIR FREDERICK, BART.
3. English Law before the Norman Conquest.....I, 88-107
32. The King's Peace in the Middle Ages.....II, 403-417

REINSCH, PAUL SAMUEL.
11. English Common Law in the Early American Colonies .....I, 367-415
25B. List of Sources for American Colonial Law.II, 164-168

ROBINSON, R.
14. Anticipations under the Commonwealth of Changes in the Law.....I, 467-491

SALMOND, JOHN WILLIAM.
61. The History of Contract.....III, 320-338

SCRUTTON, THOMAS EDWARD.
7. Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant.....I, 208
47. General Survey of the History of the Law Merchant .....III, 7-15

SEDGWICK, ARTHUR GEORGE.
69. The History of the Action of Ejectment....III, 611-645

SIOUSSAT, ST. GEORGE LEAKIN.

12. The Extension of English Statutes to the Plantations .....I, 416-430

SPENCE, GEORGE.

28. The History of the Court of Chancery.....II, 219-254

STEPHEN, SIR JAMES FITZJAMES.

34. Criminal Procedure, from the Thirteenth to the Eighteenth Century.....II, 443-530

STUBBS, WILLIAM.

8. The History of the Canon Law in England....I, 248-288

THAYER, JAMES BRADLEY.

31. The Older Modes of Trial.....II, 367-402

UNDERHILL, ARTHUR.

71. Changes in English Law of Real Property during the 19th Century.....III, 673-719

VANCE, WILLIAM REYNOLDS.

52. The Early History of Insurance Law.....III, 98-116

VEEDER, VAN VECHTEN.

20. A Century of English Judicature.....I, 730-836

25. The English Reports, 1537-1865.....II, 123-155

65. The History of the Law of Defamation....III, 446-473

WAIT, FREDERICK SCOTT.

69. History of the Action of Ejectment.....III, 611-645

WIGMORE, JOHN HENRY.

40. A General Survey of the History of the Rules of Evidence.....II, 691-701

66. Responsibility for Tortious Acts; its History.III, 474-537

WILLISTON, SAMUEL.

57. The History of the Law of Business Corporations before 1800.....III, 195-235

WILSON, SOLON DYKE.

45. Courts of Chancery in the American Colonies.II, 779-809

ZANE, JOHN MAXCY.

19. The Five Ages of the Bench and Bar of England .....I, 625-729

4